

THE HUMAN RIGHT TO DEMOCRACY

by

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## ABSTRACT

In this dissertation, I argue that democracy is a human right. In order to support this claim, my argument will proceed from a foundational moral grounding (Indirect Utilitarianism), through analyses of the concepts involved (human rights and democracy), to my conclusion. I begin by specifying the definition of democracy I find superior; proceed to an explication of the normative theory to which I appeal for my claims; then to a discussion of the justification of rights in general; followed by a discussion of human rights, and finally to my case for the human right to democracy. I follow this with a survey of the literature representing the opposing position, in order to catalogue the concerns my positive account will need to address. I then proceed to my own justificatory account. Having presented my positive account, I address the various criticisms of the minority position, using arguments that either blunt such criticism or demonstrate how the criticisms do not address my own position.

*For Lila*

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## CHAPTER 1

### EXPLICATION OF THE PROJECT

The aim of this dissertation is to argue that democracy is a human right. In order to support this claim, my argument will proceed from a foundational moral grounding (Indirect Utilitarianism), through analyses of the concepts involved (human rights and democracy), to my conclusion. I will offer Indirect Utilitarianism as a previously unexplored and viable justification of the human right to democracy.

My motivation in addressing the question of whether there is a human right to democracy stems from my strong objection to a particular strain in political thought, that claims that certain groups of people are ‘not ready for democracy’. I contend that nondemocratic societies inhibit individual self-development, and hope to demonstrate as much in the present work. Granted as much, it seems that there is a great deal at stake in the question of ‘readiness’. Millions of individual lives may be stunted in their self-development, dismissed as consigned to this fate as a result of the rationale that, since their society is not ‘ready’, there’s little to be done by those either within or outside the society in question to advance democratic governance.

Among those who defend the kind of claim to which I object are Omar Suleiman, former Egyptian Vice President, and the historian Bernard Lewis. Both were reacting to



political events that have come to be called the “Arab Spring” or – the term I prefer – the “Arab Awakening.” Before leaving office, Suleiman claimed that Egypt is not ready for democracy<sup>1</sup> (a claim savvy autocrats are encouraged to eschew). In a February 25<sup>th</sup>, 2011 interview<sup>2</sup> – once the Arab Awakening<sup>3</sup> was well underway – Lewis argued that Arabs in general are not ready for democracy:

We, in the Western world particularly, tend to think of democracy in our own terms – that’s natural and normal – to mean periodic elections in our style. But I think it’s a great mistake to try and think of the Middle East in those terms and that can only lead to disastrous results, as you’ve already seen in various places. They are simply not ready for free and fair elections... ‘The language of Western democracy is for the most part newly translated and not intelligible to the great masses.’<sup>4</sup>

Motivated by the desire to push back against such assertions, I will in the present work argue that democracy is a human right. There are a number of parts to this claim, and I will need to account, among other things, for the following: what democracy is, and how it is desirable; what a right is, and how it can be justified; what is entailed by calling a right a human right, and how this particular species can be justified; and why these questions matter in a contemporary context. Naturally, many other questions will arise in this discussion, as well as many more arguments that address them.

In this chapter I will outline the argument presented in the following chapters, followed by an introduction to the theoretic issues involved, and presentation of the problematic of the political situation of women in Iraq as an illustrative example. In Chapter 2, I define and offer a particular conception of democracy, in order to define standards my foundational moral theory can be shown to meet. In Chapter 3, I introduce the foundational moral theory I employ to justify my arguments. In Chapter 4, I present Allen Buchanan’s case for the human right to democracy, and suggest a way of strengthening it. In Chapter 5, I apply all the foregoing to a particular conception of

human rights, in order to conclude the argument that democracy is a human right. Following an overview of my main argument, I turn to elaborations of the various chapters, in order.

## **Overview**

In the discussion of democracy's relation to human rights, the predominant view (as represented by John Rawls, Joshua Cohen, and others) is that the right to democratic governance is not a human right. That is, whether there is a right of any other kind to democratic governance, these theorists deny specifically that it is not a human right. Even when it is conceded that individuals have some right to democratic governance, the justification for this right is most often posited as contingent upon other, more fundamental rights, but not as a fundamental right of the kind represented by human rights.

In my dissertation I argue the minority position on this issue, that there is a right to democratic governance and that it is a human right. I do so first by specifying which definition of democracy I find superior, then by explication of the normative theory to which I appeal for my claims, then to a discussion of the justification of rights in general, followed by a discussion of human rights in general, and finally to my case for the human right to democracy. This I follow this with a survey of the literature representing the majority position, in order to catalogue the concerns my positive account will need to address. I then proceed to my own justificatory account. Having presented my positive account, I address the various criticisms of the minority position, using arguments that either blunt such criticism or demonstrate how the criticisms do not address my own

position.

The problem, as I see it, comes down to determining what kind of defense can be made for the claim that the right to democratic governance is a human right. The narrower question I plan to address is how much promise a consequentialist defense offers as a justification for the minority claim. Arguments are well-known that utilitarianism yields conclusions that transgress rights, due to the aggregation of utility involved in its standard forms. I argue that David Lyons' Indirect Utilitarianism (IU) represents a consequentialist account that is not only immune to standard criticisms, but also offers a way of cohering intuitions that are normally at odds with one another: that while aggregation of welfare ought not to override rights, consequences matter morally. I answer the question regarding the kind of defense that can be made for the minority position with the thesis that IU is sufficient to fulfill this task. Indeed, an underlying motivation for my argument is that the largely deontological nature of the post-Rawlsian debate has ignored the possibilities offered by consequentialism in the IU form. My methodology is to present an account of democracy as a human right and show how IU works to support it. I turn now to an elaboration of each of these three aspects of my dissertation – the problem, my thesis, and my methodology.

## **The Problem**

Justificatory accounts of rights take one of two main approaches: status-based accounts are deontological in form; instrumental accounts are consequentialist. In light of persistently-entrenched disagreement over the superiority of either view, I limit myself in this dissertation to transcendental support for a particular consequentialist approach –

IU – presenting this option not as superior, but as having a certain under-recognized benefit: that it can furnish a justification for a human right to democratic governance. Thus I do not intend to make a case for the superiority of the particular consequentialist approach I employ over, say, a deontological approach. Instead, I aim to show how IU can provide argumentation most think utilitarian theories cannot. I will then move on to an exposition of IU, and show how it can support my main claim, that the right to democratic governance is a human right.

### **Foundering of the Debate**

The post-Rawlsian discussion of whether democracy is a human right, while not extensive, has failed as yet to yield a satisfactory account of the issue. On the question of whether or not democracy is human right, the work of John Rawls left the discussion in a problematic place. The literature is constituted on the one hand by tentative accounts that democracy is not a human right and on the other hand by more emphatic yet indecisive arguments that it is. This section presents a brief overview of the relevant literature as background for my argument.

John Rawls argues<sup>5</sup> that democracy is not a human right, because he believes that decent hierarchical peoples should be included in the society of peoples, despite their nondemocratic forms of government. Rawls thus criticizes the position that political rights are human rights as intolerant, thereby setting the terms of the debate, by which human rights are properly considered as minimal standards that do not accommodate claims to democratic governance. Joshua Cohen appears to accord with Rawls on this point, arguing that although a theocratic society (for instance) may be for that reason

unjust, it does not for that reason alone seem to violate human rights.<sup>6</sup>

Some prominent theorists do support a human right to democracy. Thomas Pogge characterizes democratic governance as part of a cosmopolitan human rights standard, which he supports.<sup>7</sup> Pogge explicitly characterizes the right to democratic governance as a human right, arguing that individuals significantly affected by political decisions ought for that reason to have some roughly equal influence in the making of that decision. Carol Gould argues that the relationship between human rights and democracy is properly understood not as one's being a category of the other, but rather that they share a common root – freedom. I mention these two authors for the purpose of demonstrating, for one, that there are those who agree with me on the central conclusion. However, I do not believe that either of these two authors' accounts of a human right to democracy represents the strongest possible case. But by way of making my own case, I return to Carol Gould's work in Chapter 4.

Generally, however, the question of whether democracy is a human right is not adequately addressed in the theoretical literature. The discussion appears to have foundered, with no decisive argument emerging on either side of the question. A shift in the theoretical foundation of for democracy may thus be worth investigating.

One problem faced by human rights theorists is choosing the foundation to which to appeal in defending human rights. This problem arises due to the fact that a theory's beginning determines, in part, its end. This, as Alistair Macleod notes,<sup>8</sup> is because the particular justification given for a right is so intimately tied with its content and scope that the foundation provided determines to a significant degree the nature of the rights yielded by the particular theory. Working as one must with an elaborate array of social

and political considerations from conception to implementation of such rights, a human rights theorist runs the risk of choosing a foundation well-suited for some tasks, yet unsuited for others.

## **Methodology**

I follow other authors who take the minority position, and present an argument that attempts to justify democracy as a human right, but do so with the innovation of deploying a consequentialist rights justification to make my case. In order to show how IU works to support my claim that the right to democratic governance is a human right, I present the following order of auxiliary arguments:

- 1 Define democracy and present a justification for it.
- 2 Present IU and explain how it functions.
- 3 Demonstrate the insufficiency of the most interesting version of the minority position, and argue for a particular improvement on it.
- 4 Show that IU can support sufficiently robust claims about human rights in general, and then specifically the human right to democratic governance as I've specified in 3, above.

Elaboration of these arguments follows.

I first address the question of what is meant by democratic governance, in Chapter 2. I present a comprehensive evaluation of the variety of democratic theories offered by William Nelson, whose own positive account I endorse. I then present the more detailed articulation of democratic theory proposed by Amy Gutmann and Dennis Thompson, such that my consequentialist account might have a more specific set of goals for its

justificatory aim. Nelson offers a consequentialist justification of democracy. I will treat his account as a defensible elaboration on Lyons' reading of John Stuart Mill.

Next, I present the consequentialist account in which I intend to ground my main argument's claims about rights. I aim to show how IU supports rights, in accordance with the functioning of Lyons' theory as I've described it above. (While Lyon's treatment of the interpretation of IU I employ is only briefly treated in his *Forms and Limits of Utilitarianism*, I refer to the work of Richard Brandt and Peter Railton, in order to formulate my version of IU with greater specificity.) I take care to avoid defining rights in a facile way that would render a consequentialist account vacuous. I focus on showing the way in which IU provides a better defense for the human right to democratic governance than its utilitarian alternatives, rather than a full defense of either IU or consequentialism.

I then demonstrate how this version of the minority position can benefit from augmentation, by presenting Allen Buchanan's account of the human right to democratic governance. I make the case for an improvement on his theory that involves Elizabeth Anderson's notion of equality (among others), before demonstrating how IU can also support this "Andersonized" version of Buchanan.

Having grounded the right to democracy in a particular rights theory, I turn to a demonstration of how IU supports not simply rights in general, but the narrower and more controversial category of human rights. I do so by first addressing the question of what is meant by the term 'human rights' by presenting the work of James Nickel, before showing how IU can furnish human rights that meet Nickel's criteria. As with Nelson, I treat Nickel's account as a defensible elaboration on the work of John Stuart Mill.

Having presented the arguments on which my position on democracy as a human right depends, and defined the main terms employed by this position, I turn to the exposition of my main argument: that IU supports a human right to democratic governance. I then present Joshua Cohen's argument that the right to democratic governance is not a human right, and reply to this position. This reply will have three main parts. The first will be to argue that Cohen's definition of democracy is inferior, by reference to Bill Nelson's evaluation of accounts of the form Cohen's definition takes. The second part of my reply to Cohen attempts to answer his concern that considering the right to democratic governance to be a human right jeopardizes democracy's particularly 'demanding' nature. The third part of my reply to Cohen is a critique of the Rawlsian ideas Cohen references, most prominently Rawls' arguments regarding what it is reasonable to expect agreement upon in global public reasoning. In essence, I will argue that the way forward in disagreement between peoples can be through appeal not to commonality of values, but to commonality of the reasons that support them. Here my discussion will reference the work of Akeel Bilgrami. Having addressed Cohen and Rawls, I turn to other theorists, whose work presents variations upon Rawls' and Cohen's themes.

The structure of my dissertation is as follows. In Chapter 2, I present William Nelson's definition of and justification for democracy. I follow this with an exposition of the theory of deliberative democracy advanced by Amy Gutmann and Dennis Thompson, which I argue can serve as an elaboration of Nelson's democratic theory.

In Chapter 3, I present Lyons' Indirect Utilitarian theory (as elaborated by Brandt and Railton), and explain how it functions. Here I make the case that IU can serve as a



ground for rights claims.

In Chapter 4, I present a promising argument for a human right to democratic governance – that of Allen Buchanan – and demonstrate how it stands in need of elaboration. I will attempt to demonstrate how involving the conception of equality defended by Elizabeth Anderson and others improves Buchanan’s account.

In Chapter 5, I show how IU supports human rights, first by defining the term ‘human rights’ using the work of James Nickel, and then by showing how IU can furnish human rights that meet Nickel’s criteria. I aim to demonstrate how this account improves on Nickel’s theory. I then address the main question, and build upon the arguments from the previous chapters to make the case for a human right to democratic governance. I then present Joshua Cohen’s case for a negative reply to the main question and respond to Cohen’s argument. Doing so requires that I address the work of John Rawls, which I will do in part by appealing to the work of Akeel Bilgrami. I then present the more recent work of other theorists whose positions present variations upon Rawls’ and Cohen’s themes.

### **Buchanan’s Project and the Iraq Problematic**

Allen Buchanan’s endeavor to establish a normative grounding for international law posits democracy as a human right, but one contingent upon its enabling the protection of more fundamental security rights. Making political rights contingent upon security rights is potentially problematic for the attempt to establish political equality, since there is insufficient argumentation in a defense of security rights to support political rights, as I attempt to demonstrate in part by appeal to the political situation currently faced by

women in Iraq.

I propose the following problematic as a way of illustrating my theoretical argument. The example case concerns the current political situation in Iraq. I intend to show that while Islamic law (Shari'a) provides equal security rights for women, it does not provide equal political rights. It is thus a problem case for post-Rawlsian views that would see Iraq as a minimally decent society, as well as for views such as Buchanan's which base political participation rights on security rights. In this section I will first substantiate the claim that Shari'a involves a tendency to define gender roles that assign unequal political rights to women, and then attempt to demonstrate how the case of Iraq is problematic for Buchanan.

According to a study by the United States Institute of Peace, "Islamism...is destined to play a major role in the future of Iraqi politics."<sup>9</sup> Many Islamist regimes are characterized by denial of women's social and political rights. This issue thus arises with each new possibility of a regime that is subject to the influence of Islamic law. A development in January 2009 – in which guarantees that at least 25 percent of Parliamentary seats would be set aside for women that were included in earlier versions of Iraqi election law were excluded from the law's published version – demonstrates the frailty of the constitutional safeguards placed against such exclusion.<sup>10</sup>

Let us treat as a hypothesis the claim that security rights for women in Islamic societies appear roughly equal to those of men.<sup>11</sup> Thus under Shari'a Iraqi women have equal security rights, but they are likely to have unequal political rights.<sup>12</sup> Article 2 of the Iraqi constitution reads

First: Islam is the official religion of the State and it is a fundamental source of legislation:

- A. No law that contradicts the established provisions of Islam may be established.
- B. No law that contradicts the principles of democracy may be established.
- C. No law that contradicts the rights and basic freedoms stipulated in this constitution may be established.

It is possible that the patriarchal tendency of Islam will deny women political rights. A sufficient number of the citizens of Iraq may be willing to accept this, as a result of their placing greater value on religious interests. In addition, the proscription of such a development by Iraqi political institutions can count as religious persecution, since it denies Iraqi citizens the freedom to live in accordance with their religious beliefs. While the perils to women's political rights represented in article 2A are provided for in article 2C,<sup>13</sup> the "established provisions of Islam" are likely to reflect that culture's curtailment of the political rights of women, which means that these two articles are likely to come into conflict with one another at some point. What will result from this conflict is anyone's guess, but the prospects are dim for women's rights, given that the allegiance of most Iraqi citizens to their religious leaders seems to be stronger than that to the current government.

In Chapter 2, I present the definition of and justification for democracy, as formulated by William Nelson.

## Notes

<sup>1</sup> ‘U.S. faults Egypt VP for saying country isn’t ready for democracy’, Haaretz, Feb.08, 2011, URL=<<http://www.haaretz.com/news/world/u-s-faults-egypt-vp-for-saying-country-isn-t-ready-for-democracy-1.342086>>

<sup>2</sup> ‘A mass expression of outrage against injustice’, The Jerusalem Post, 02/25/2011, URL=<<http://www.jpost.com/Opinion/Columnists/Article.aspx?id=209770>>

<sup>3</sup> In a later chapter, I address the political situation of women in Iraq. Although the Arab Awakening is a more recent development, the situation in Iraq is, at the time of writing, more settled than that in Tunisia, Egypt, Libya, or Yemen.

<sup>4</sup> ‘A mass expression of outrage against injustice’, The Jerusalem Post, 02/25/2011, URL=<<http://www.jpost.com/Opinion/Columnists/Article.aspx?id=209770>>

<sup>5</sup> Rawls, *The Law of Peoples*, p. 91

<sup>6</sup> Cohen, “Is there a Human Right to Democracy?”, from *The Egalitarian Conscience: Essays in Honour of G. A. Cohen*, p. 236

<sup>7</sup> Pogge, *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms*, p.195

<sup>8</sup> Macleod, *Universal Human Rights: Moral Order in a Divided World*, p. 8

<sup>9</sup> Fuller, *The New Turkish Republic: Turkey as a Pivotal State in the Muslim World*, p. 167

<sup>10</sup> ‘Changes in Iraq Election Law Weaken Quota for Women’, New York Times, January 13, 2009, accessed via <<http://www.nytimes.com/2009/01/14/world/middleeast/14iraq.html>> on 1/14/2009.

<sup>11</sup> Here I refer to security rights per se. That other impositions on the interests of women – for instance, the denial of education – worsen the overall situation of women in Islamic societies is a claim I do not dispute.

<sup>12</sup> The Qur’an is in fact silent on the issue of women’s political rights, thus the source of gender-based repression is not doctrinal. Feisal Abdul Rauf offers an account of the systematic apparatus that permits such patriarchal insinuation into the ideology of Shari’a:

The problem lies in confusing cultural norms with religious belief or law. Unless we separate the theological from the sociocultural dimensions of the issue, we are likely to misread the situation. What complicates the understanding of the gender issue, even by Muslims, is that Muslim jurists regarded the custom (*adah*, ‘urf), or common law of a society, as a source of law when the Qur’an or sunnah was silent on an issue. Thus, what was custom in a particular time or place found its way into Islamic law. [Rauf, 2004]

This appears to account (in at least broad terms) for how patriarchal cultural norms have become associated with Islamic law.

<sup>13</sup> Article 14 of the Iraqi Constitution is “Iraqis are equal before the law without discrimination based on gender, race, ethnicity, origin, color, religion, creed, belief or opinion, or economic and social status.”

## CHAPTER 2

### DEMOCRACY

In order to defend the claim that the right to democratic governance is a human right, I must first specify what I mean by ‘democracy’. (In Chapter 5, I will also specify what I mean by a human right.) The conditions on a system of government’s counting as democratic remain a matter of dispute, but are in part determined by the particular justification offered for a candidate definition of democratic government.<sup>1</sup> The reasons for supporting features such as the separation of powers, periodic voting, and protection of minorities will derive from the justification, the requirements of which are expressed in a particular definition.

Theories of democracy vary widely, so thorough discussion of the topic requires some extensive house-sorting, if one is to make the case for a superior conception of democracy. To do so I turn first to William Nelson’s survey of democratic theories that conveniently sorts the multitude of theories into broad categories for evaluation. In this chapter I will set out a version of democracy that combines Nelson’s with Gutmann and Thompson’s deliberative approach. The account I develop is open government in the deliberative sense. I plan thereby to have equipped myself with a workable definition of democracy for my main discussion regarding its viability as a human right.

The right to which I read Nelson as defending is defined, in part, as requiring particular institutional arrangements – ones that aim at certain core values. These institutional arrangements include such commonly-cited features as: the free, fair, and frequent election of officials; freedom of expression; a variety of information sources; protection of minorities; and autonomy of association. Whether or not these institutional arrangements are sufficient to support maintenance of a system of democracy that satisfies Nelson’s definition, however, is determined by whether they further the core values Nelson specifies. The values at which they aim are: the improvement of the moral character of a society’s citizens, such that the interests of others are more likely to be weighed; that given conflicting claims, citizens seek something beyond mere self-interest, via the application of principles and maxims that aim at the common good. I elaborate these further, below.

### **A Survey of Democratic Theories**

In his *On Justifying Democracy*, William Nelson assesses a number of democratic theories as insufficient to the task of making a moral case for the superiority of democratic governance over other kinds. I will offer a synopsis of his criticism before presenting his positive theory. Nelson’s approach is to consider accounts of democracy in light of the adequacy of the justifications offered for them. In developing his account of democracy, Nelson rules out some candidate definitions because of clear problems with their justification.

The first theory Nelson criticizes is majoritarianism, by which democracy is justified simply because it confers decisional authority to voting majorities. That is,

majoritarianism is justified exclusively by appeal to the principles of anonymity and neutrality as standards of fairness in democracy. Anonymity and neutrality, the majoritarian argument goes, confer fairness on decisions. Decision by majority rule is anonymous, in that it is unaffected by who votes on one side or the other. It is neutral in that every proposal has a chance of winning – the majority need simply choose it.

Majoritarianism thus has a purely proceduralist justification, because it operates independently of the decisions that result. This is exactly the fault Nelson finds with such a theory, since specification of independent standards regarding outcomes is possible. Thus anonymity and neutrality, standing alone, are compatible with unjust outcomes, such as unequal protection of rights. As Peter Singer argues, “equal rights to a cake would not be satisfied if the majority walked off with the whole cake.”<sup>2</sup> If outcomes matter morally, a justification that does not take them into account is thereby insufficient, and along with it the specification of democracy as simply majoritarianism.

Nelson next addresses the participation theory of democracy. Participation theorists also argue that democratic justice is a purely procedural matter, since participation is intrinsically desirable, independent of consequences. Thus as long as the decision procedure satisfies the criterion of participation, it is just. The aim of democracy, under this theory, is a ‘participatory society’ in which individuals exercise maximum possible control over their own lives and environment. Under participation theory, policy should result from extensive, informed debate, with officials serving as agents of the public, as represented by a majority vote.

While Nelson acknowledges the importance of participation, he points out a number of problems with it as a justification for democracy. The first of these is that by

this theory, whether or not a political system counts as democratic depends on the degree to which citizens make use of the system. Nelson argues that it is more plausible, when evaluating a system, to evaluate the system itself, rather than its degree of use. While particular decisions may be characterized as more or less democratic in virtue of the degree of participation they involve, it seems that the conditions for a political system's counting as democratic are met in constitutional provisions, rather than in to what degree people choose to make use of the system provided. This is because, as Nelson argues, participation theorists must count a system which (at least over time) involves low levels of participation as nondemocratic – however, if participation is but one variable among others, “maintenance of an optimal level of democracy, over the long run, may actually require a low level of participation.”<sup>3</sup>

Another problem Nelson finds with participation theory is that, as a purely procedural standard, participation is open to the same criticism over unjust outcomes as is majoritarianism, and is thus insufficient for the same reason. Participation by itself is insufficient to blunt the choice of decisions that are seriously unjust.

Nelson's third reason for rejecting the available participation theories is that they fail to articulate just why a society with greater participation is morally better. He argues that the following three interpretations of participation all fail: consent, equality, and promotion of virtue.

Reading participation as representing the consent of the governed – as does Peter Singer – is problematic, Nelson, says, since there's no clear reason to think that those on the losing side of a vote consent to the decision made. Without an account of how the losing side consents, there can be no appeal to this interpretation as the standard by which



democracy is justified. Singer supports the view that regardless of outcome, participation in voting represents “quasi-consent,” which as a matter of convention operates as consent proper. Participants who do not declare the intention to respond to unfavored outcomes with disobedience generate legitimate expectations on the part of other participants, and thereby incur an obligation to accept the outcome.

Nelson replies to Singer's argument by presenting a thought experiment. Suppose, Nelson proposes, that voting takes place as it ordinarily does – in a highly structured institution (the state), and that it concerns laws and policies to be coercively enforced. In such a case, and presuming that the relevant state officials took themselves as bound by the result, Nelson reasons, the effect of voting would be much the same, even if participants generally did not view themselves as consenting to the election result. They would, Nelson says “simply realize that they would be stuck with the results of the election, and that they consequently ought to try to influence it.”<sup>4</sup> That is, voting would still have a point, with people taking the cynical attitude that they are stuck with the decision, but not that they consent. Thus the conceptual connection between voting and consenting that Singer proposes appears unsupported.

The standard of participation might also be interpreted as securing the equality of an important right. As Carl Cohen argues, “[c]itizens have a right to an equal voice in decisions that significantly affect them all.”<sup>5</sup> Thus participation is important, the idea goes, because through it, all are granted a certain kind of equal standing. However, Nelson argues, people make unilateral decisions all the time that significantly affect others, as in the cases of parenting, land ownership, employment, and the selection of spouses. That is, many decisions are made by individuals that affect other individuals

significantly, yet such decisions are not considered to violate equality of rights. So, Nelson reasons, any right to an equal voice in decisions that significantly affect all citizens is subject to contextually determined limits, and some of these may inveigh on political procedure. Reasoning thusly, Nelson objects that the very broadness of the justifying principle – that people have the right to an equal voice in decisions that significantly affect them all – while providing the sought-after answer in some political contexts, can lead to counterintuitive results when applied in others.

Nelson then turns to democracy as popular sovereignty. According to this theory, democracy is justified because its decision procedure grants authority to ‘the will of the people’. The simplest elaboration of this notion, Nelson says, is that what people think ought to be done, is done by the state. But this explanation is itself subject to further inquiry. One problem is that when we look to “the people,” we find only individuals, many of whom disagree with one another. But the more fundamental problem with the notion of ‘the will of the people’, Nelson argues, is that there is no functioning definition of this notion, and none seems possible, since the only apparent alternatives – appeals to either autonomy or liberty – both fail to be practical. Where ‘the will of the people’ is rooted in appeals to autonomy, legitimacy means that those subject to a political system’s *de jure* authority are also morally obligated to acquiesce in this authority. However, if we define legitimacy thusly, and also claim that all have a fundamental obligation to be autonomous (c.f. Kant), there is a conflict of authority, unless unanimity obtains. Since such a formulation of ‘the will of the people’ requires a unanimous standard, Nelson reasons, it is impractical.

Where 'the will of the people' is rooted in appeals to liberty, theorists utilize the standard that where morality is silent, government decisions must respect the freedom of its citizens by according with their choices. However, such a formulation also seems to require unanimity, since in those places where morality is silent, government must not coerce anyone to act against her wishes in these areas. On these grounds, Nelson concludes that liberty-based interpretations of 'the will of the people' are also impractical.

Another group of democratic theories Nelson criticizes are economic justifications. Such theories, though they vary widely, are characterized by three common elements: 1. an abstract deductive character; 2. the assumption of rational utility maximization by individuals; 3. operation on a market model (i.e., amalgamation of individual preferences to determine a set of policy decisions). The problem with such theories, Nelson argues, is that desires do not appear intrinsically worthy of satisfaction, yet their satisfaction is the standard to which economic justifications appeal. Thus, Nelson argues, economic accounts lack the ability to provide moral justification for democracy.

Of the various justifications for democracy, Nelson finds participation theory most plausible. The interpretation of participation theory that most resembles Nelson's own is that of Carole Pateman, who reads participation as promoting virtue. Through the process of participation, Pateman explains, citizens develop such virtues as responsible character, group harmony, autonomy, and appreciation of alternative viewpoints. The point of the participation theory of democracy, Pateman argues, is not the quality or kind of legislation produced, but a participatory society, which she defends as valuable in itself. Stating Pateman's focus in this way, Nelson notes, can seem misleading, since on

Pateman's account a participatory society will positively affect the character of those involved, leading to more virtuous individuals.

Nelson's disagreement with this, he says, is not with the form of Pateman's argument, but rather with the details of it. Nelson argues that the character traits in question are either not clearly *eo ipso* desirable, or are so only under the assumption that a participatory society is rightly sought. Absent a full, independent justification for the desirability of the traits in question, Nelson says, this rationale for democracy is incomplete. Pateman, he argues, does not offer any such independent justification – as it stands, he argues, her account is circular. Without reference to some external account, the virtues extolled are not clearly desirable, independent of reference to participation.

In his analysis of participation theory, Nelson's focus has been on the desirability of participation. Among the various theories, he fails to find an account of why participation is desirable. He formulates his own account by providing the missing independent moral framework, such that participation will make reference to a particular conception of the good, thereby rendering it immune to criticisms of circularity and mere proceduralism. I turn now to Nelson's positive account.

### **Nelson's Theory: Democracy as Open Government**

Nelson follows his assessment of the surveyed literature with his positive theory, that democracy is justified in virtue of the tendency of open government to produce just legislation. His general criticism of the alternate theories of democracy is that they fail to treat the issue of justification seriously enough, in that they neglect reference to a theory of morality. According to Nelson, a proper justification for any political system must

make reference to some account of morality – for if a political system purports to further some good, it must specify the nature of the good to which it refers. I will first present his account of morality – which furnishes the independent moral framework he finds lacking in Carole Pateman's work – before presenting his justification for democracy: that government that is open (in the way he defines) tends to produce just legislation.

Nelson explains that his account of morality is both minimal, in that it provides only some basic conditions, and functional, in that it specifies some of what must be done by a system of morality.<sup>6</sup> Minimally, he argues, an adequate morality is a set of principles that has three properties:

1. The principles must represent a system of rules proscribing harmful conduct/ensuring beneficial conduct.
2. The principles must be able to serve as the public, shared set of principles constituting a stable, fundamental charter of a well-ordered human association.
3. The principles must be able to perform the function articulated in 2. in a society of free and independent persons. (This involves two empirical assumptions: one, we are not genuinely indifferent to the opinions of others; two, it is costly and difficult to conceal one's conduct.)

Having formulated this minimal account of the moral system to which his justification for democracy appeals, he proceeds to the theory itself.

Nelson characterizes his argument as Madisonian, in that it affirms that democracy is superior to other forms of government because it prevents tyranny. Thus one effect at which his account will aim, as a minimal standard, is the prevention of rule by small minorities or individuals, a standard which involves the protection of individual rights. So one standard to which Nelson's account will hold outcomes is whether rights are protected. Such protection supports the proscribing of harmful conduct, a condition of the first principle in Nelson's account of morality.

Nelson's approach also incorporates the work of John Stuart Mill. With Mill, Nelson argues that that form of government is best in itself which, given propitious circumstances, produces the best effects. This production of good effects, Nelson reasons, stems from a central feature of Millian democracy, namely that it improves the moral character of its citizens. Through the exercise of democratic government, individuals required to serve on juries or in office are compelled "to weigh interests not his own; to be guided, in the case of conflicting claims, by another rule than his private partialities; to apply, at every turn, principles and maxims which have for their reason of existence the common good."<sup>7</sup> This compulsion to develop one's individual moral capacity, coupled with the open nature of democratic government, furnishes Mill with reasons to claim that democracy tends to produce results that are more morally defensible than its alternatives. These values, then, are the core at which the institutional arrangements required by Nelson's definition of democracy aim.

However, Nelson notes, Mill does not limit his justification of democracy solely to the tendency for improvement of the moral character of its citizens; Mill also roots his justification for democracy in a substantive moral theory:

[Mill] does evaluate institutions in part by their effects on character, but a moral theory – utilitarianism – serves as the foundation of the argument. Without such a foundation, the argument would be radically incomplete. It would rest, as does Pateman's argument, on a merely conventional list of vaguely specified 'democratic' character traits. We need to go further than that.<sup>8</sup>

This argument from Nelson prompts mention of my intention to show how his arguments justifying democracy can be read as a possible elaboration of Mill. I will also argue that, as an elaboration of another aspect of Mill's work, Lyons' formulation of IU (as

interpreted in light of the work of Richard Brandt and of Peter Railton) can serve as an elaboration on the substantive moral theory called for by Nelson. More on this, shortly.

Like Mill, Nelson broadly characterizes democracy as representative government, but he reasons that the feature of democracy – whether direct or representative – most important for the just results he has in mind (such as the protection of rights) is that it is open. By “open,” Nelson means that administrators and legislators are forced to defend their actions publicly. In meeting this condition, Nelson reasons that administrators and legislators must formulate principles with justifications that are both coherent and likely to gain widespread acceptance. Such justifications tend to result in legislation that meets the standards articulated in the second and third principles of Nelson’s theory of morality. These latter two principles express conditions justified by Rawlsian notions of public reasoning. Rawls’ well-ordered society is governed by common principles that result from agreement through public reason – principles which can serve as the fundamental charter with which citizens can be expected to comply.

According to Nelson’s justification of democracy, then, political openness leads to just legislation, which is defined in part as the protection of rights deemed appropriate through the process described in the second and third principles of Nelson’s theory of morality. Laws that pass the test of public justifiability tend to be just because open government, in yielding policy proposals that must be both coherent and capable of gaining widespread acceptance, tends to produce just legislation, an important aspect of which is the prevention of tyranny through the protection of rights.

In Chapter 3, I aim to demonstrate that Nelson’s sense of openness is justified by IU. Nelson argues for his definition of democracy as superior to its alternatives, for the

reason that it tends to yield the most moral results. Since this definition is consonant with the substantive moral theory I present in the following chapter – Indirect Utilitarianism (which, in turn, satisfies Nelson’s minimalist requirements for a system of morality) – I will treat Nelson’s definition of democracy as a viable elaboration of David Lyons’ reading of John Stuart Mill.

I follow Nelson in defining democracy as a system that makes available the means to participate in a government that is open, in the ways he specifies. (The institutional arrangements required by the maintenance of such a system, as I’ve noted, will include such commonly-cited features as: the free, fair, and frequent election of officials; freedom of expression; a variety of information sources; and autonomy of association.) I will thus state the right I have in mind as the right to participate in a system of government that is open (i.e., public, with administrators and legislators forced to defend their actions publicly). For further specification of what “openness” requires for the account of democracy I will be employing, I turn to Gutmann and Thompson’s deliberative model.

### **Gutmann and Thompson’s Deliberative Model**

The term ‘deliberative democracy’ has had many uses, some of which are incompatible with one another, and many of which would benefit from further clarification. In their *Democracy and Disagreement*, Amy Gutmann and Dennis Thompson advance an apparently simple thesis: that when citizens or their representatives disagree morally, they ought nevertheless to persevere in reasoning together to reach mutually acceptable decisions. The simplicity is in appearance only, for



the implications of the main idea are, as they demonstrate, quite complex. The methodology they articulate in spelling out the implications of their main thesis forms the body of their version of deliberative democracy.

The domain in which their method operates, they explain, is the neglected midrange of abstraction in ethics between the micro level – assessment of individual acts, which involves institutional rules – and the macro level – theories of justice, which involve the delineation of the basic structures of an ideal society, such as its foundational principles. This method does so by positing a process in which deliberators shift back and forth between general principles and judgments regarding particular circumstances, modifying each in light of the other, rather than trying to impose the elements of one domain unidirectionally, to yield judgments in the other. Their argument focuses on what must be prior to any empirical investigation into whether deliberative democracy is superior to its alternatives – namely, the clarification of deliberation itself – and is thus not itself an empirical argument.

### **The Persistence of Moral Disagreement**

Gutmann and Thompson argue that while political disagreement takes many forms, the most intractable political disagreements are moral. For argument to count as moral, it must exhibit certain characteristics. Minimally, they say, this includes the characteristic of generality – arguments that are moral apply to all individuals who are similarly situated. In addition to this most basic characteristic of moral arguments are those of reciprocity, publicity, and accountability. Given their great importance in political disagreement, these latter three will represent the main principles of deliberative

democracy. In Chapter 3, I aim to demonstrate that the moral claims made by Gutmann and Thompson are consonant with IU.

Gutmann and Thompson explain that deliberative democracy aims to operate within actual, rather than ideal, societies. They expect that citizens will be encouraged to take their opponents' moral claims more seriously, if they avoid concluding (by thought experiment) that fellow citizens would agree on moral matters, if only the discussion took place within an ideal society. Rather than claiming that the results of all actual deliberation are just, the authors argue that the more closely the conditions of deliberative democracy are met, the more justifiable the results will be.

Gutmann and Thompson give four reasons for the persistence of moral disagreement: scarcity, limited generosity, incompatible values, and incomplete understanding. Brief elaboration of each of these follows. They argue that since moral disagreement is rightly expected to persist, due to these factors, a process such as is indicated by their theory offers the best chance at the resolution of moral conflict.

The authors reference David Hume's claim that the facts of scarcity of resources and limited generosity are the only sources of moral conflict, agreeing that these are indeed to be included, but that they form an incomplete list of the sources of moral conflict. They note that Thomas Hobbes makes a similar claim, when he attributes all moral conflict to self-interest. Gutmann and Thompson find such claims overly reductionistic.

In their counterargument to such claims, an example they note is the fact that those who would incur loss of wealth from a tax increase nevertheless favor it in many cases, in order to increase social security revenues. They argue that an answer to this

example that accounted for such phenomena by expanding the notion of self-interest to include such things as the upholding of rights, fair treatment of those one cares about, and so on, deprives the charge of self-interest of its critical content: if all action is motivated solely by self-interest, the reduction of moral conflict to self-interest is a truism. The authors also cite Brian Barry, who argues that since the equation of self-interest with rationality is pure assertion, the claim is subject to counter-assertion, that impartiality is rational. In the absence of further argument, he concludes, there is no reason to assent to the equation of self-interest with rationality.

Gutmann and Thompson thus argue that two additional sources of moral conflict must be acknowledged, namely the incompatibility of values and the incompleteness of understanding. These two sources have a mutually supporting relationship, the authors explain. Values supported by sustained arguments stand in many instances in direct opposition to one another. The authors explain that while the reasons that support values are evaluable as superior or inferior to one another – such that moral conflict based on incompatible values alone may be in theory resolvable – the fact of incomplete understanding (to which all individuals are subject) reliably prevents such resolution. While the authors' claim that moral conflict cannot be avoided may be too strong, the weaker claim that it is virtually guaranteed works sufficiently in the context of their broader arguments. Having made the case for the persistence of moral conflict, they turn to evaluating democratic responses.

## **Democratic Responses to Persistent Moral Disagreement**

Gutmann and Thompson characterize democracy as a conception of government that accords equal respect to the moral claims of each citizen, and is, in virtue of this feature, morally justifiable from the perspective of each citizen. They argue that if moral disagreement is intractable, it is best to live in a situation in which the moral status of each is respected to the greatest degree possible. Thus, they reason, given the persistence of moral conflict, democratic solutions are superior to alternatives. They evaluate the two dominant accounts of democracy before presenting their own.

Like Nelson, Gutmann and Thompson find pure proceduralism lacking. According to procedural democracy, the only expression of citizens as political equals is majority rule, simply because minority rule fails to be such an expression. Proceduralists affirm only those rights necessary for democratic procedures, and look only to whether the political procedures involved are fair in determining whether a political system is justifiable.

Constitutionalists, on the other hand, affirm not only those rights necessary for democratic procedures, but also those aimed at just outcomes. Constitutionalism, then, is the position that both rights to proper procedure and rights that minimize unjust outcomes are required by democracy. Gutmann and Thompson argue that since a basic condition of morality—reciprocity—is not satisfied in cases in which the basic liberties or opportunities of an individual are not protected, and that majority rule, taken alone, permits such outcomes, proceduralism cannot suffice in conferring moral legitimacy to a political system. However, they also argue that constitutionalism does not provide a full account of democracy. Since constitutionalists, no less than proceduralists, require

morally justified procedures for arriving at politically binding decisions – and do so most often by turning to majority rule – they must find a suitable form, and in doing so they move toward deliberative democracy.

Deliberative democracy rejects the premise, shared by both proceduralists and constitutionalists, that either process or substance must have priority. Deliberation, they argue, is outcome-oriented: citizens deliberate with the aim of justifying collective decisions to one another, as best they can. The outcome sought here is the maximizing of agreements among participants who reliably represent fundamentally differing views in an environment of persistent moral disagreement. The relationship between procedures and outcomes is dynamic, on their model, and neither has priority. Having made their case for greater prominence of deliberation in the democratic process, they present their theory.

### **Six Principles of Deliberative Democracy**

Gutmann and Thompson divide their list of principles in two. Three principles (reciprocity, publicity, and accountability) represent conditions for the regulation of deliberation. Three others (basic liberty, basic opportunity, and fair opportunity) represent key components of the content of deliberation. In accordance with reciprocity, citizens offer reasons for their preferred direction in collective decisions – ones that others, similarly situated, are more likely to accept, even though they realize they have only some values in common. In doing so, citizens exhibit mutual respect as moral agents. Through appeal to shared reasons, the authors argue, deliberation offers greater promise in finding resolution to moral conflict. Failing such resolution, deliberation that

appeals to shared reasons tends to produce decisions that are more widely acceptable, and as such are less likely to be the source of political discord. A prominent standard of reciprocity, as the authors conceive it, is that empirical claims be consistent with reliable methods of inquiry, the aim of which is to provide a less divergent pool of facts to which deliberation can appeal.

By the principle of publicity, discussion takes place, not simply between two interlocutors, but before all citizens. The authors offer four reasons why publicity is essential to justifiable government. First, only public justifications are available for consent by all citizens. Second, making justifications public contributes to the broadening of moral and political perspectives. Third, publicity more than secrecy serves as a proper expression of mutual respect. Fourth, the self-correcting character of deliberation – by which citizens are encouraged to consider changing their minds – is impeded, absent access to the reasons for the available alternatives.

Last among the authors' regulatory principles, accountability entails more than securing re-election and respecting constitutional rights. In deliberative democracy, representatives are expected to justify their actions in moral terms. Representatives are accountable ultimately to citizens, and this standard entails such duties as offering well-formulated replies to criticism. This regulatory principle concerns the relationship between those offering justification and those to whom it is offered. Accountability is thus an issue of agency, in contrast with publicity's being a issue of forum.

The three principles of deliberative democracy that represent key components of the content of deliberation are basic liberty, basic opportunity, and fair opportunity. These constitutional principles aim at limiting the permissible consequences yielded by

the process described in the authors' regulatory principles. In the principle of basic liberty, the authors have in mind the Millian conception, which is based on bodily and mental integrity (“Over himself, over his own body and mind, the individual is sovereign”<sup>9</sup>), appropriately tempered by considerations of paternalism and moralism. What constitutes appropriate tempering of liberty, the authors argue, is to be determined through a process of deliberation that focuses on enhancing personal integrity, since this interest can be furthered in some instances when paternalistic and moralistic considerations curtail absolute liberty.

The principle of basic opportunity expresses the notion that citizens ought to have secured for them an adequate level of goods necessary for a decent life, in the society in which they are situated. “The essential point,” they argue, “is that citizens should not be denied basic opportunities on the basis of factors for which they are not responsible.”<sup>10</sup> In this way, Gutmann and Thompson argue, the effects of the morally arbitrary distribution of goods and talents might be mitigated.

The principle of fair opportunity grants individuals the possibility of an equal chance of improving their situation:

The principle holds that government should ensure that each citizen has a fair chance to secure opportunity goods such as advanced education and skilled employment. What the principle requires in practice depends on what fair opportunity means in the context of any particular opportunity good.<sup>11</sup>

For example, in industrialized nations the issue of fair opportunity is raised by issues of preferential hiring and advancement in the workplace. Through deliberation, the authors argue, purely meritocratic considerations should be balanced with efforts to end what morally indefensible discrimination persists in the society in question.

By treating neither the content nor the regulation of deliberation as primary, Gutmann and Thompson argue, the deliberative aspect of democracy gains in prominence, leading to outcomes that stand a greater chance of assent by those subject to the resulting legislation. Their six principles, taken in concert, present a promising approach toward this end.

### **Democracy as Deliberation-based Open Government**

Following Nelson, I define openness in government as involving the public defense of administrators' and legislators' actions. Following Gutmann and Thompson, I define deliberation-based democracy as characterized by their six principles. The principles that Nelson specifies as constituting democracy as open government seem entirely consonant with those of Gutmann and Thompson. Since both aim at the public defensibility of positions taken regarding governance, I will treat Gutmann and Thompson's theory as an elaboration of Nelson's more fundamental justification of democracy. Granted that Gutmann and Thompson's deliberative democracy can serve as an elaboration of the more general account offered by Nelson, I will proceed using this hybrid model I will hereafter refer to as "democracy as deliberation-based open government" (or simply "my version of democracy"). Thus the definition of the right to democracy I defend is a right to participate in a political system that is open in the ways Nelson, Gutmann, and Thompson specify.

I turn next to an account of David Lyons' Indirect Utilitarian theory, and explain how it functions. There I make the case that IU can serve as a ground for rights claims, in addition to undergirding my arguments about democracy I have made in the present



chapter. I will treat Nelson's definition of democracy as a viable elaboration of David Lyons' reading of John Stuart Mill.

## Notes

<sup>1</sup> *n.b.*: The use of ‘justification’, with respect to Nelson’s theory, refers not to the justification of democracy itself, but the justification for a particular *definition* of democracy.

<sup>2</sup> Nelson, *On Justifying Democracy*, p. 22

<sup>3</sup> *Ibid.*, p. 40

<sup>4</sup> *Ibid.*, p. 44

<sup>5</sup> *Ibid.*, p. 45

<sup>6</sup> In Chapter 5, I will argue that these conditions are capably met by IU.

<sup>7</sup> Mill, *Collected Works* p. 53-4

<sup>8</sup> Nelson, *On Justifying Democracy*, p. 51

<sup>9</sup> Gutmann and Thompson, *Democracy and Disagreement* p. 230

<sup>10</sup> *Ibid.*, p. 274

<sup>11</sup> *Ibid.*, p. 307

## CHAPTER 3

### INDIRECT UTILITARIANISM

Utilitarianism is notorious for its inability to accommodate substantive rights. In particular, the aggregation of utility that is central to less sophisticated versions of the theory yields implausible moral judgments, with respect to the treatment of individuals. In this paper, I remain silent on the issue of the superiority of any particular normative theory over rival systems. My aim here is to demonstrate that utilitarianism – properly formulated – can suffice as a ground for rights claims, a task for which it is commonly dismissed as a viable theoretical candidate.

The proper treatment of individuals is a priority around which most accounts of rights are formulated. For this reason any normative theory that fails to adequately account for rights is—to the degree to which it fails— seen as flawed by rights theorists. For instance, suppose – as in the common example – Dr. X, following utilitarian reasoning, harvests the organs of an otherwise healthy patient, in order to transplant her vital organs to five other patients who would otherwise die. In such a case, the utilitarian aggregation of good appears to recommend the organ harvesting, whereas considered moral judgment concludes that the healthy patient thereby suffers a serious injustice. If these two considerations cannot be reconciled, this speaks ill of utilitarianism's viability

as a normative theory, according to rights theorists.

In this chapter, I aim to demonstrate how utilitarianism, when construed in a specified manner, can provide a plausible account of substantive rights. The argument I present here will not constitute a free-standing defense of utilitarianism's superiority over rival normative theories. Instead, this argument is an attempt to show how a normative theory that is commonly dismissed as a candidate foundation for rights-claims can, in fact, plausibly account for substantive rights.

### **Forms of Utilitarianism**

The merits of act utilitarianism include the provision of definitive answers to moral questions, by way of measurement of the factors that are relevant to whatever moral question is at issue. However, the aggregation and direct application employed by act utilitarianism undermines the theory in the judgment even of many who are sympathetic to it, as demonstrated in the example of Dr. X. As a result, augmentations of utilitarian theories have been undertaken, and a distinction is made between act and rule utilitarianism. Act utilitarianism is the simplest form of utilitarianism, in that it applies the calculus of aggregation directly to individual acts. Rule utilitarianism, by contrast, is intended to overcome objections of the kind demonstrated above, by positing utilitarian aggregation at one remove. Under rule utilitarianism, the calculus does not apply to individual acts, but instead to the rules by which individual acts are evaluated. So it's impermissible, under rule utilitarianism, to harvest the tonsil patient's organs, because otherwise hospitals would come to resemble casinos, in that whether your health improves or vanishes altogether occurs as a function of whoever else happens to be under

care at that time, and also—crucially—who is on staff. Since hospitals are where individuals go for health care, and trust in these institutions is eroded by outcomes such as that effected by Dr. X, utility is not maximized, since fewer will seek care where the expertise lies. As a result, overall health will be reduced, which none prefer – hence non-optimal utility, under rule utilitarianism.

### **Indirect Utilitarianism**

In the following sections, I aim to specify what I mean by the term ‘Indirect Utilitarianism’ (IU), and why I choose the particular meaning that I do. One innovation in the defense of utilitarianism has been to appeal to generalized utility, the total effect of a hypothetical “everyone” performing a particular act. We can understand generalized utility in a number of ways. Two of these, so-coined by Richard Brandt, are acceptance rule utilitarianism (ARU) and obedience rule utilitarianism (ORU). It is my intention to defend IU as interpreted under ARU. To do so, I will appeal primarily to the work of John Stuart Mill, David Lyons, Richard Brandt, and Peter Railton. In the following sections, I offer an account of what it means to interpret IU as ARU, and why I do so. In short, I distinguish, following others, between the practical and critical levels of IU: that common actors at the practical level will follow rules as if behaving deontically, while at the critical level, the reasons for adopting a particular set of rules are spelled out in indirect utilitarian terms. First, I must spell out why it is necessary to adopt a viable form of utilitarianism.

### **Background of IU: Extensional Equivalence**

In *Forms and Limits of Utilitarianism*, David Lyons addresses the claim that reference to generalized utility – a term for the basic appeal of the question “what are the consequences of everyone’s performing  $x$ ?” (as opposed to the consequences of ‘one’s’ performing  $x$ ) – yields a form of utilitarianism that is resistant to criticisms of act utilitarianism. His arguments capably demonstrate that the distinction between act and (a certain form of) rule utilitarianism is a spurious one. Lyons argues that act utilitarianism (AU) and generalized utility (GU) are extensionally equivalent. By this, he means that once the actual utility of an act is multiplied by  $n$  iterations of the act, which constitutes the hypothetical “everyone’s” performance of that same act, the actual utility of the act under the former (AU) and latter (rule-utilitarian, interpreted as referencing what happens when everyone obeys a particular rule) descriptions is quantitatively the same. After some terminological clarification, Lyons’ argument for this conclusion follows.

Lyons argues that the correct description of a single act will include all its “general utilitarian properties,” the “causal properties in virtue of which the universal performance of acts of that kind would produce some utility or disutility.”<sup>1</sup> By this he means that the proper description of a given act will offer a full account of those consequences which are measurable in terms of their utility.

The causal property that concerns Lyons is the extent to which others’ performance of acts similar to the one in question influences some causal property of that act. For example, if I am calling from New York to my friend in Scotland, my ringing his phone at time  $T$  depends upon whether the number of other New Yorkers calling Scotland are sufficient to overload the line capacity at  $T$ . Thus, Lyons argues, the effect

of one's act depends upon whether or not others perform the same act. This dependency, Lyons argues, is a causal property of one's act, and thus properly belongs to the description of that act.<sup>2</sup>

Lyons raises this point in order to draw a distinction between linear and non-linear functions of utility. With the former, the difference between the utilitarian properties of a single act and those of others' performing the same act is a linear function, in that the act as performed by many will simply be some multiple of the utilitarian property of the single act. For instance, if I drop a penny in a fountain, the utilitarian property of others doing the same is a function of the utilitarian property of the single act multiplied by the number of others who perform the same act. So when only I perform the act, one penny enters the fountain, and when ninety-nine others perform the act, the number of pennies in the fountain will be a function of the number of individuals performing the same act, namely 100. In this case, AU and GU are quantitatively identical.

Nonlinear functions of utility, on the other hand, result in utilitarian properties that are other than a sum of repetitions of the same act, as with my call to Scotland. Since in this case there is what Lyons calls a 'threshold effect' – there being at a certain time more calls than the telecommunications infrastructure can maintain – the function is nonlinear, in that the sum utility of all single calls is not equal to the total utility that results. Thus the utilitarian property of my act is not simply a function of multiplying my act by some number of callers, since the net effect is other than that number of calls plus mine – it includes my inability to place the call.

In situations of linear functions of utility, there will be what Lyons calls

extensional equivalence between the sum utility of single acts and the total utility that results. That is, the total utility (GU) and the sum of the utility of single acts (AU iterated  $n$  times) of a particular type will be equal. With nonlinear functions, however, extensional equivalence does not obtain, since the total utility that results is not equal to the sum of the utility of single acts of a particular type.

However, Lyons argues, once the general utilitarian properties of single acts are properly accounted for, they will in fact include my inability to place the call. Among the general utilitarian properties that Lyons argues properly belong to the description of a single act is a particular causal property, namely the extent to which others are performing the same action. This causal property – the threshold effect – is the lynchpin by which Lyons shows that act utilitarianism and rule utilitarianism (defined as evaluating rules by looking to what happens when everyone acts in accordance with a particular rule) are extensionally equivalent.

Lyons argues that the threshold effect of a particular act belongs to the proper description of that act's general utilitarian properties. If this is the case, then the general utilitarian properties of a single act performed  $n$  times will be extensionally equivalent to the act's being performed under a rule-utilitarian description – by which a hypothetical “everyone” performs the act – since the general utilitarian properties under both descriptions share a linear relationship. Thus the evaluation of acts will be extensionally equivalent under both act-utilitarian and rule-utilitarian descriptions. If this is always the case – as Lyons argues it must be, granted the inclusion of threshold effects among an act's general utilitarian properties – then act utilitarianism and rule utilitarianism (defined as above) are themselves extensionally equivalent. And if this is so, Lyons concludes,



the distinction between act utilitarianism and rule utilitarianism collapses. As a result, rule utilitarianism fails to overcome the same objections that present act utilitarianism as a nonviable ground for rights claims.

At the end of *Forms and Limits of Utilitarianism*, however, Lyons distinguishes between two ways of construing GU via rule utilitarianism: one he dubs “specious” rule utilitarianism; the other “ideal” rule utilitarianism. The former, he argues, leads to extensional equivalence, while the latter does not. This distinction, I will argue, is analogous to Richard Brandt’s distinction between obedience rule utilitarianism and acceptance rule utilitarianism, which I elaborate below. Unless one is able to formulate IU in such a way that renders it immune to the charge of extensional equivalence, IU cannot form the basis for the normative claims I aim to defend.

### **Mill as Indirect Utilitarian**

In *Rights, Welfare, and Mill’s Moral Theory*, Lyons formulates a version of utilitarianism that aims at overcoming the objections to prior forms, such as the extensional equivalence of act and rule utilitarianism. His theory, he argues, constitutes a correct reading of John Stuart Mill’s discussion of the relationship between rights and the principle of utility. I will first offer some general descriptive comments regarding Lyons’ reading of Mill on rights, before proceeding to an account of how indirect utilitarianism (IU) functions. The main feature of Mill’s theory emphasized by Lyons is the distinction between morality and expediency. This distinction, Lyons explains, mirrors the relationship between justice and morality, in that not all cases of immoral behavior involve an injustice, which is a kind of immorality that involves the violation of a right.

Lyons cites the following text to support his claim that Mill intended such a distinction:

We do not call anything wrong, unless we mean to imply that a person ought to be punished in some way or other for doing it; if not by law, by the opinion of his fellow-creatures; if not by opinion, by the reproaches of his own conscience. This seems the real turning point of the distinction between morality and simple expediency. ...This, therefore, being the characteristic difference which marks off, not justice, but morality in general, from the remaining provinces of Expediency and Worthiness; the character is still to be sought which distinguishes justice from other branches of morality.<sup>1</sup>

That is, 'unjust' belongs to the category 'immoral', and 'immoral' belongs to the category 'inexpedient'. Since morality is a domain of expediency, conduct can be negatively appraised (as inexpedient) without condemning it as wrong (immoral). Acts falling in this realm are inexpedient, since they fail to maximize utility, but Mill is not committed to calling them morally wrong.

Thus, Lyons argues, the principle of utility is not a moral principle, rather a principle of expediency. The following statements by Mill regarding rights suggest the indirect nature of the principle of utility:

When we call anything a person's right, we mean that he has a valid claim on society to protect him in the possession of it, either by the force of law, or by that of education and opinion. If he has what we consider a sufficient claim, on whatever account, to have something guaranteed to him by society, we say that he has a right to it. If we desire to prove that anything does not belong to him by right, we think this done as soon as it is admitted that society ought not to take measures for securing it to him, but should leave him to chance, or to his own exertions.<sup>2</sup>

This passage is followed immediately by Mill's statement that his sole recourse in the defense of this account of rights is appeal to "general utility."<sup>5</sup> Lyons argues that any interpretation of the relationship between these statements other than an indirect utilitarian account obviates the need for the entire fifth chapter of *Utilitarianism* and directly contradicts much of what is said there.<sup>3</sup>

Lyons reads Mill as committed to the priority of principles of justice. That is,

principles of justice that protect interests – which in turn can be defended on utilitarian grounds – are the most important: “Justice is a name for certain classes of moral rules which concern the essentials of human well-being more nearly, and are therefore of more absolute obligation, than any other rules for the guidance of life.”<sup>7</sup> Thus for Mill, Lyons argues, principles of justice – such as the provision of rights – cannot be trumped by other considerations, such as utility.

Given this, Lyons argues, Mill is not an act utilitarian. For Mill, moral right and wrong are functions of moral rights and their correlative obligations, which are governed by principles of justice. Expediency, on the other hand, is governed by the principle of utility. According to Lyons’ reading of Mill, for something to be wrong, sanctions must be fitting, which for Mill means that a coercive rule can be justified by appeal to utility maximization, via the argument from interests, above. Thus under IU, utilitarian reasoning applies to the choice of the best set of rules directly but regulates conduct itself only indirectly. This, according to Lyons, precludes the theory’s vulnerability to two main rights-based objections to standard utilitarian accounts.

The first of these is the ‘grounding problem’, which points out the difficulty standard utilitarian accounts have with grounding rights claims; if the maximization of utility is the basic ethical principle – as with standard utilitarian accounts – there seems to be no way to account for rights claims. Under IU, however, accepting a principle is a matter of its benefits outweighing costs. As a matter of principle, a right can be established, given an account that the absence of a given right is more costly than its general acceptance. So, for example, the otherwise healthy student who arrives at the hospital for knee surgery is not in peril of having her vital organs harvested in order to

save five others from death under IU, since the cost of allowing such considerations would include a disastrous degree of erosion of public confidence in medical institutions.

The second rights-based objection to standard utilitarian accounts is the ‘trumping problem’, which specifies shortcomings in such accounts’ ability to preserve rights against welfare maximization. While the grounding problem concerns the difficulty in basing rights claims in a system in which utility maximization seems inhospitable to assertions that an individual has a particular right, the trumping problem concerns the difficulty of maintaining rights as trumps over the utility principle in standard forms of utilitarianism. However, under IU, considerations of marginal utility cannot infringe on rights, since utilitarian reasoning has no direct bearing on appraisal of conduct. Again to the student with the knee injury. Not only is it the case, under IU, that she benefits from a right against involuntary organ-harvesting, but such considerations simply do not apply, since utility maximization does not operate at so direct a level of analysis.

Having dealt with the grounding and trumping problems, Lyons proceeds to a general account of how an indirect utilitarian theory might function:

Mill's general idea can be understood as follows. We can distinguish three levels of normative concepts and judgments. For present purposes, the bottom (most concrete) level concerns the rightness or wrongness, justice or injustice, morality or immorality of particular acts. The intermediate, second level consists of moral principles, which concern (general) moral rights and obligations. Judgments of right and wrong conduct at the bottom level are functions of moral rights and obligations, and of nothing else. ...A particular act is right if and only if it does not breach a moral obligation, unless that obligation has been overridden by another obligation. But moral principles are not self-certifying; they turn upon values they somehow serve (Mill is least clear about this relation). The topmost level of normative concepts and judgments concerns the values that may be invoked to establish moral principles (which concern general moral rights and obligations). For Mill, of course, the value at work at this topmost level is human happiness or welfare. So, moral principles about general rights and obligations are supposed to have a direct relationship to the principle of utility. But judgments concerning the rightness or wrongness of particular actions have no such relation. Acts must be judged as right or wrong depending on whether they respect moral rights and obligations, and never on the basis of direct utilitarian

reasoning.<sup>4</sup>

By ‘principles’, I take Lyons as referring to those principles of justice that protect important interests and, as such, garner high acceptance utility, such that any set of rules that neglects them will not qualify for candidacy as, on an IU account, the best (and thus correct) set of rules. This stratification employed by IU provides the machinery requisite to overcoming the grounding and trumping problems, and provides the way for a utilitarian account of justice. In the following sections, I will present a more detailed account of IU.

### **Indirectness**

The aspect of indirectness does not specify a particular theory. Rather, it is a strategy of which a number of theories have partaken. In consequentialism, indirectness means that in order to judge the moral rightness of some thing (an act, motive, or virtue, among others), we look to the consequences in terms of something other than the thing itself. Contrast this with direct consequentialism, in which we look to the consequences of the thing (act, etc.) itself, in order to judge the moral rightness of that thing.

Among indirect consequentialist theories there is some variation, and the most common kind is (a proper formulation of) rule consequentialism. Under rule consequentialism, the moral rightness of an act is determined by looking to the consequences of a rule. These consequences can be measured in at least two different ways. Recall that Lyons compares AU with GU, concluding that the two are extensionally equivalent. This results from one of two ways of measuring the consequences of a set of rules, namely in terms of the consequences of everyone's

obeying that set of rules. In his “Toward a Credible Form of Utilitarianism,” Richard Brandt formulates a first approximation of rule utilitarianism in the following way:

An act is right if and only if it conforms with that set of general prescriptions for action such that, if everyone always did, from among the things which he could do on a given occasion, what conformed with these prescriptions, then at least as much intrinsic good would be produced as by conformity with any other set of general prescriptions.<sup>5</sup>

Brandt points out that such a formulation looks to how people actually behave, in determining the rightness of a rule. Following Lyons, he argues that formulating rule utilitarianism in this way allows its collapse into act utilitarianism, thus subjecting the theory to all criticisms to which act utilitarianism is subject. Brandt argues that the reason this first approximation constitutes a specious form of rule utilitarianism is the directness of its appeal to consequences, in the determination of whether a rule is justifiable.

Another way of measuring the consequences of a set of rules is in terms of the consequences of everyone's internalizing that set of rules. These two ways of measuring the consequences of everyone's doing x (acting—in one way or the other—according to a set of rules) go by the names obedience rule consequentialism [ORC] and acceptance rule consequentialism [ARC].

Brandt formulates a version of acceptance rule consequentialism that appears immune to Lyons' criticism regarding extensional equivalence, in the following way:

An act is right if and only if it conforms with that learnable set of rules the recognition of which as morally binding—roughly at the time of the act—by everyone in the society of the agent, except for the retention by individuals of already formed and decided moral convictions, would maximize intrinsic value.<sup>6</sup>

By “the society of the agent,” Brandt explains that he is referring to “the largest area over which common rules can be adopted without loss of utility.” By “except for the retention

by individuals of already formed and decided moral convictions,” Brandt is referring to [130.2] those felt obligations that reliably act as second-order rules that inveigh upon settling conflicts among first-order rules. However, the most prominent feature of this formulation, for my purposes, is the way in which it is immune to the criticism of extensional equivalence. Under ORC, a rule (or system of rules) is judged as justified or not, based upon the actual utility that results from following that rule (or system). Under ARC, the number and complexity of rules is limited to that which can be accepted by a critical mass of individuals in the same society as the agent. If the rules are not limited in this way, the cost of internalizing the rule set outweighs the benefit of adopting it, which means that that rule set is unjustifiable. By limiting the set of rules in this way, the GU resulting from ARC is not equal to the resulting AU, thereby avoiding extensional equivalence and collapse. So when we look to obedience utility, we measure the anticipated effects of everyone's doing x, which leads to collapse into act utilitarianism. When we look instead to acceptance utility, we avoid such collapse.

How might ARC appear, in practice? In his “Alienation, Consequentialism, and the Demands of Morality,” Peter Railton distinguishes between subjective and objective consequentialism: under subjective consequentialism, actors consciously aim at the overall good, and the rightness of an act will be a function of what is seen by the actor as most reasonable; under objective consequentialism, Railton explains, “the criterion of the rightness of an act or course of action is whether it in fact would most promote the good of those acts available to the agent.”<sup>7</sup> This distinction is what underlies the claim that there are practical and critical levels of IU. Railton explains that

an objective rule-consequentialist sets actual conformity to the rules with the highest acceptance value as his criterion of right action, recognizing the

possibility that the best set of rules might in some cases – or even always – recommend that one not perform rule-consequentialist deliberation.<sup>8</sup>

By this, I read Railton as saying that given, on the one hand, that the criterion one applies to actors under ARC is not that agent's own account of the utility involved, but rather the actual utility involved; and, on the other hand, that – under the best set of rules – consequentialist deliberation is not undertaken by the actor, that although the ethical system is consequentialist, the behavior of actors appears deontic.

There is a problem with Railton's formulation, since it references actual conformity to rules. As we saw from Brandt's discussion of ORC/ARC, referencing actual conformity to rules results in extensional equivalence between RU and AU. However, it appears possible to amend Railton's formulation to say 'an objective rule-consequentialist sets acceptance of the rules with the highest acceptance value as his criterion of right action', in which case we overcome this problem in Railton's formulation. As such, I will proceed under the premise that Brandt's and Railton's elaborations on IU permit an interpretation of IU, by which at the practical level appears deontic, while the critical level of analysis is indirect utilitarian.

Distinguishing between the practical and critical levels of IU (by which common actors will follow rules as if behaving deontically, while at the critical level, the reasons for adopting a particular set of rules are spelled out in indirect utilitarian terms) allows me to refine what I take to be "indirect" in IU in the following way. My use of the term 'indirect' points out the indirect relationship between deontological acts and the good of GU. Moral actors accept the best set of rules (with "best" cashed out as "best at maximizing GU") – but they do not aim at GU, even though at the critical level the consequences of their accepting the best set of rules are revealed as maximizing GU,



hence ‘indirect’.

### **How Indirect Utilitarianism Functions**

According to the sanction theory of moral obligation, which Lyons attributes to Mill, one has a moral obligation if a certain sort of rule could be justified. So if a rule is in principle justifiable by appeal to general utility (contrast this with rule utilitarianism, in which rules are justified by direct appeal to general utility), moral obligations are thereby generated. The way in which “direct appeal” and “in principle” differ here is this: when applying utilitarian calculus by direct appeal (to either acts or rules), one determines the rightness (or wrongness) of an act by immediate reference to the utility principle; if the utilitarian calculus is applied only in principle, then utility maximization applies only to the choice among sets of rules, and not to rules or acts themselves.

On Mill’s account, Lyons argues, obligations of justice (which include respect for rights) are not absolute but may be overridden – but not by utility maximization, since this is not a moral commitment. For Mill, to act unjustly is not simply to infringe a right, but to do so in the absence of an overriding right or obligation. Thus on Lyons’ account Mill furnishes the mechanics by which rights are neither absolute nor overrideable directly by utility maximization.

This account squares with the standard picture of rights as not absolute, but rather as subject to some limits – and these are often derived via consequentialist reasoning. Lyons explains that this account of the relationship between rights (in particular their potential to come into conflict with one another) functions in a fashion similar to that defended by Joseph Raz. By Raz’s account, rights entail exclusionary reasons, which

operate as second-order reasons for excluding otherwise valid reasons for action from consideration. So in the case of Dr. X, the right held by the knee surgery patient not to be killed represents an exclusionary reason that, regardless of direct utility maximization, preclude the harvesting of her organs.

So by Lyons' reading of Mill, to determine whether an act is just, one asks whether it violates a right. In so doing, one asks whether a person should be protected from or guaranteed something, in a particular way, by reference to some important interest. This is a question about an ideal social rule (n.b., thus far no mention of utility). To answer such questions, one must invoke substantive values, consequentialist or other. Thus, Lyons argues, taking rights seriously is not left optional by Mill. To neglect rights (as, e.g., an act utilitarian does) is to confuse moral with instrumental value (i.e., to fail to acknowledge the morality/expediency distinction). Under Mill's theory, rights involve interests, and the interests served by the principle of justice that could be defended on utilitarian grounds are the most important. Rights to security and freedom of action are seen by Mill as most vital, Lyons argues, and as such they correspond with the primary obligations of justice, and thus take precedence over all other obligations.

Lyons finds an explicit grounding for rights claims in Mill's provision for his principle of liberty:

That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.<sup>9</sup>

From this Lyons proposes this variation on Mill's principle of liberty: "The prevention of harm to other persons is a good reason, and the only good reason, for restricting

behavior.”<sup>10</sup> This “harm principle” functions like the principle of utility, only more narrowly: (1) it concerns harm to others, not welfare generally; and (2) it concerns coercion, not action generally. Although freedom may be limited only for prevention of harm, the conduct interfered with need not itself be considered harmful to others (e.g., a requirement to give testimony in court). From Mill’s principle of liberty, Lyons claims, further rights can be derived. I will argue that democracy is among these.

Lyons’ reading of Mill is neutral with respect to the various contemporary accounts of rights (viz., claim, choice, and beneficiary): “To have a right, then, is, I conceive, to have something that society ought to defend me in the possession of. If the objector goes on to ask why it ought, I can give him no other reason than general utility.”<sup>11</sup> Mill’s account of rights seems closest to claim theory (that rights are essentially claims), but is compatible with the other two accounts. Thus IU is not vulnerable to controversies regarding the superiority of these competing views.

Since the specified goal of the foregoing discussion is harm prevention, rights that protect individuals from harm will follow more or less directly from the hp argument. I will argue that Bill Nelson’s conception of democracy, as tending to produce just legislation, is defensible by Lyons’ harm principle reading of Mill’s account of rights.

### **Lyons’ Disavowal of Indirect Utilitarianism**

Having done as much to account for a viable utilitarian theory of justice, Lyons appears to dismiss IU as employing conceptual claims that the relevant moral concepts cannot bear. It is possible, he argues, for an agent dedicated to IU to resort to direct utilitarian reasoning. Lyons argues that too much weight on utilitarian considerations

may be a moral error, but not a conceptual mistake:

Consider, for example, our imaginary utilitarian official. When he takes into account the effects of his conduct on human welfare while trying to decide what to do, he does not seem to be confused or to be violating the constraints of the moral concepts. If he places too much weight upon direct utilitarian considerations, that may be a moral error, but it does not seem to be a conceptual mistake. As a utilitarian, it seems incumbent on him to consider the effects of his conduct on welfare. If so, we have no reason to believe that direct utilitarian considerations will not dominate his moral reasoning. Thus, we have no reason to believe that satisfactory utilitarian theory of moral rights and obligations can be developed. So we have no reason to believe that a utilitarian would be obliged to respect the moral force of justified legal rights and obligations.<sup>12</sup>

As such, he argues, there is no guarantee that an agent dedicated to IU will not resort to direct utilitarian reasoning. This reasoning follows from his thesis in *Forms and Limits of Utilitarianism*, that resort to the direct application of the principle of utility is inevitable under any form of utilitarianism.

Here I depart from Lyons' view. To the contrary of his argument, I maintain that the placing of "too much"<sup>13</sup> weight on utilitarian considerations is indeed a conceptual mistake. Under IU, general welfare is the critical-level aim in all cases, yet aiming at it directly is just what gets us into trouble. Consider the societal sanction against racial discrimination. If a health care provider were to decide "I will not discriminate against this patient on the basis of her race" on a case-by-case basis, this seems wrong, since one thereby implicitly allows that each case involves a distinct decision to not discriminate on the basis of race. If a decision is made in each instance, this implicitly allows for the decision to go the other way. The sanction against racial discrimination is better formulated "I will not discriminate on the basis of race" simpliciter, since the range of possibility is not coextensive in these instances, and the latter more capably represents a general sanction. The direct application of utilitarian calculus Lyons imagines is analogous to this example of racial discrimination, in that IU shows that the direct

application of the principle of utility to acts or rules is a violation of its restriction to third-order application only, since either alternate form is extensionally equivalent with a form of utilitarianism that cannot account for rights. As such, it does involve a conceptual error, since the scope of the principle is not coextensive in the two cases.

After all Lyons does to substantiate the claim that IU can accommodate substantive rights, the brief discussion he dedicates to the judgment that it cannot in fact do so represents a decidedly thin treatment. Lyons abandons his theory prematurely, with scant argument. For moral errors can lead to conceptual mistakes. The failure to recognize the legitimacy of individual sanctity is exactly the error act utilitarians make. Yet individual sanctity can be spelled out in IU terms. Since individual sanctity is a universal concern, it is a legitimate aim for impartial IU. As such, it counts as a legitimate, utility-defined general limit to utility maximization in individual circumstances.

Nonetheless, some philosophers find the appeal to principles other than direct utility calculation suspect in a utilitarian theory, such as IU. Will Kymlicka argues that IU is ad hoc:

The utilitarian says that the reason why we use non-utilitarian procedures is that they happen to maximize utility. But isn't it more plausible to say that the reason why we use non-utilitarian procedures is simply that we accept a non-utilitarian standard of rightness? Why think there has to be some indirect utilitarian explanation for our non-utilitarian commitments?<sup>14</sup>

Perhaps, Kymlicka argues, grounding of rights is better served by an alternate theory, one that does not appeal to general utility. Once we account for rights as limits on utility maximization, he reasons, why not simply discard the principle of utility?

This objection misconstrues the derivation of the principle of liberty as found in Lyons' interpretation of Mill. Based as it is upon the harm principle, as Lyons argues, the

derivation of the principle of liberty refers ultimately back to human well-being. After all, how can liberty have any value for humans, if not by ultimate reference to their well-being? To say that liberty is intrinsically valuable appears to set the principle adrift, without reference to its importance for humans.

Even if a defender of IU were to concede that some arguments for principles of justice owe their traction to origination in alternate normative theories, this does not doom IU to dismissal as ad hoc. Allan Gibbard approaches the question in this way:

What place does a non-utilitarian rationale have in utilitarian argument? Just this: People in general, utilitarians and non-utilitarians, can be strongly moved by a principle with a coherent rationale, and especially one that seems to fill in the dictum “to each his own.” They claim that when we look at the [non-utilitarian] principles that have such strong appeal and test them carefully against our more specific moral convictions, we find no coherent whole [that those principles compose].<sup>15</sup>

That is, coherence is a standard with considerable appeal for agents, and IU can supply this coherent whole. Gibbard explains how this might work:

A principle with a rationale that carries conviction may be of great utility. Suppose two alternative principles both have a high acceptance-utility: for each, its being adopted and followed by most people would have high utility. If one has much more natural appeal as a principle than does the other, there will be greater utility in supporting it even if it has slightly less acceptance utility. It will not only be more convincing to others; it will command the utilitarian's own principled adherence more securely.<sup>16</sup>

The deliberation Gibbard suggests can operate exclusively at the critical level of IU. Such an approach appears sufficient to overcome the kind of objection advanced by Kymlicka, since Gibbard's argument shows that principles of justice that originate in alternate normative theories can be justified by IU, via the fact that, as Gibbard says “[a] principle with a rationale that carries conviction may be of great utility.”

## Indirect Utilitarianism and Rights

Several authors have taken up the question whether consequentialism can ground rights claims. I will address a sample of such arguments, in order to support my main goal – to show that IU can be used to support substantive rights. Philip Pettit argues<sup>17</sup> that rights can be recognized by the consequentialist, because the recognition of rights serves as the best way to promote a particular sort of highly desirable consequence, namely dignity:

[A] person retains dignity in his treatment by another only if he preserves a certain dominion over how he fares at the other's hands: only if that other agent is not free to do to him whatever he wills, or even whatever some beneficial plan requires.<sup>18</sup>

Pettit reasons that if the consequentialist is serious about dominion as a requisite of dignity, she must appropriately constrain consequentialist calculation. These constraints are the very rights sought by those such as myself, who aim to ground rights claims in a consequentialist theory, such as IU.

John Gray argues that we may characterize IU as a rights-based political theory grounded in a goal-based moral theory. In this he echoes Lyons' formulation of IU as prohibiting the direct application of utilitarian calculation to act evaluation:

First, and most fundamentally, the principle of utility figures here not as a prescriptive principle, but as a general standard of evaluation. Indirect utilitarianism may be defined as that species of utilitarian theory in which a strong distinction is marked between the critical and practical levels of moral thought, and in which the principle of utility is invoked, solely or primarily, at the critical level.<sup>19</sup>

Since IU treats rights as second-order utility, Gray argues, the conceptual machinery is supplied to prevent IU's collapse into act utilitarianism. Further, he argues that since Mill treats autonomy and security as elevated over other human interests by appeal to the harm principle, we ought to look to these two vital interests rather than what utility results for

the agents in question, in deliberation on the limit to the agents' liberty. He notes that these two vital interests function in Mill much as do Rawls' primary goods.

As Thomas Nagel concedes, "there are evils great enough so that one would be justified in murdering or torturing an innocent person to prevent them."<sup>20</sup> Consequences – when bad enough – appear to justify the qualification of individual rights. That is, Nagel argues that considered judgment about rights shows them to not be absolute. If the preventable death of one person will (somehow) preclude the deaths of a thousand (pick your number) others, considered judgment seems to fall on the side of preventing the thousand deaths. Status-based accounts thus seem to need to appeal to some account of consequences, to describe how such qualifications operate. I believe that instrumental accounts can provide for the assigning of great importance to rights, without exposing an account of rights to the criticism that absolutist accounts of rights suffer, by never granting exceptions.

Such circumstances as Nagel evokes are accounted for by Mill, when he says that direct reference to utility is only prompted in the conflict among values. Such prompting occurs with marginal cases such as the time-bomb planter who must be tortured in order to save an overwhelming number of lives. The erroneous (from Mill's perspective, on Lyons' reading) divergence into act utilitarianism occurs when states exploit such a principle for prudential purposes.

### **IU and Sen's Inclusive Consequentialism**

A possible alternative to IU is defended by Amartya Sen,<sup>1</sup> who criticizes broadly-construed utilitarianism for neglecting morally relevant consequences of action. He



locates this problem in utilitarianism's constraining of evaluation only to utilities, which results from its dedication to welfarism. His alternative, Inclusive Consequentialism ("IC"), while also consequentialist, makes no such commitment to narrowing evaluation to utilities – hence “inclusive.” Sen explains that his notion of consequentialism resembles the account offered by Philip Pettit, whom he quotes as defining the term thusly: “Roughly speaking, consequentialism is the theory that the way to tell whether a particular choice is the right choice for an agent to have made is to look at the relevant consequences of the decision; to look at the relevant effects of the decision on the world.”<sup>2</sup> Here we find no reference to any standard of measurement, which Sen argues is a virtue of this approach.

In elaborating his account of IC beyond the account furnished by Pettit, Sen discusses the following three features: situated evaluation; maximizing framework; and nonexclusion of state components. By *situated evaluation*, Sen refers to the question of which perspective is the appropriate one from which the evaluation is to be made. If consequentialism requires taking responsibility for the results of one's actions, then the particular individual making the choice must be aware of his own position in relation to his actions and their consequences.

Sen imparts an excellent and vivid illustration of situated evaluation, by way of a dialogue between Krishna and Arjuna (the invincible archer) from the *Mahabharata*, as they are on the brink of the battle at Kurukshetra. Krishna rebuts Arjuna's misgivings about the probability that Arjuna will kill many of his family and friends in the coming battle, by arguing (in deontological fashion, Sen notes) that since they both agree that their cause is just, Arjuna must fight irrespective of the consequences. Sen takes Arjuna's

side in the debate, reasoning that the abstraction inherent in Krishna's logic (that because *one* (in this case, Arjuna) is in the situation he is in, *one's* (Arjuna's) duty follows irrespective of consequences) neglects an important and morally relevant feature of the situation – namely, that it is not merely “one” who is so situated, but *Arjuna*, who bears particular relations to those he would kill, and must bear the additional consequence that it is Arjuna *himself* who must bear the situated consequences of his actions.

By *maximizing framework*, Sen refers to the fact that since consequentialism aims at some goal, then, from among a number of options, the one that best accomplishes the specified goal is the one rightly chosen. Sen notes that this feature of consequentialism has been criticized as involving an unfulfillable requirement – that all possible outcomes must be known, in order to be ranked in relation to one another. He rebuts this criticism by arguing that while *optimization* requires this, maximization does not, nor does it even require an identifiably best alternative. Maximization, he argues, only requires that one not choose an alternative that is worse than another that can be chosen. Again, Sen offers a fruitful analogy in explaining this feature, by reference to the parable of Buridan's ass, which could not distinguish between two haystacks. As an optimizer, the poor animal could not choose, and starved to death. By this he aims to show not only that the distinction between maximization (the lesser standard) and optimization (the higher standard) is a significant one, but that IC is not exposed to the criticism that it involves an unfulfillable requirement.

For an illustration of *nonexclusion of state components*, Sen turns back to the significance of Arjuna's misgivings – namely, the difference between killing people in general, and killing his friends in particular. Sen argues that IC is superior to

utilitarianism, in that utilitarianism involves an arbitrary *a priori* exclusion of nonutility components of the state of affairs resulting from an act, while IC does not. In Arjuna's case, Sen argues, he cannot treat others' killing of people and his own killing of people in the same way. That is, agent-specific state components involve demands that non-agent-specific state components do not. As a result, Sen argues, the fact that IC can distinguish between agent-specific state components and non-agent-specific state components, while utilitarianism cannot, makes IC the superior account.

I have no quarrel with the constructive elements of Sen's argument. It is my aim, in this dissertation, to show how a model that many dismiss as a viable ground for rights claims can be so viable. As for Sen's critiques of utilitarianism, I do not aim, in this dissertation, to defend utilitarianism broadly – I aim instead to show how IU can withstand criticisms that show how other forms of utilitarianism are not a viable ground for rights claims. However, Sen's arguments against utilitarianism warrant response. I will now address Sen's criticisms of utilitarianism, in order to demonstrate how IU can withstand such criticisms.

Sen's ideas of situated evaluation and nonexclusion of state components both pose a challenge to utilitarianism, given that, in restricting evaluation to welfare, it neglects morally important aspects of outcomes. Thus as a form of utilitarianism, IU might be expected to suffer the same shortcoming. There appear to be two ways to answer such a charge. One is that, in the case of Arjuna, his situation with respect to his friends and family might be seen as a prudential issue, rather than a moral one, inasmuch as killing his friend differs from killing a stranger. This, it can be argued, is due to the fact that (as Sen argues<sup>3</sup>) impartiality seems to be an important condition among normative systems.

Thus the difference between Arjuna's killing a stranger or a friend is morally insignificant, and as such cannot constitute the basis for a criticism of utilitarianism. The fact that Arjuna insists that there is a difference does not *eo ipso* imply that there is a moral difference – it may be merely a psychological one, for him.

Perhaps, however, this response to Sen's criticism is too narrow. The second way to answer the charge of arbitrary exclusion is to argue that Sen underestimates utilitarianism's ability to account for the apparently excluded factors. It is unclear why restricting consequentialist evaluation to utility *neglects* the features Sen specifies, rather than providing a medium into which such features can be *translated*. For instance, Sen also discusses the example of a parent's choosing food for her baby:

Consider, for example, the parent of a child for whom she is choosing a particular baby food. The requirement of situated evaluation does not, in any way, vindicate smugness about one's contingent level of ignorance, and does not deny the need for the person to find out, if reasonably possible, more about what others know or see (for example, that the baby food with which the parent is familiar might have been shown to be harmful). Nor does it deny the relevance of broader sympathies (for example, a parent may well ask whether it is right that her child should have the benefit of some baby food to which other children do not have access). What is denied is the possibility of ignoring the person's own responsibilities in her particular situation, in this case that of being a parent of this child.<sup>21</sup>

In this case, there are no names – any parent bears a particular relationship to their child that cannot be captured by a formulation of  $Rxy$ , where  $x$  and  $y$  are generic individual humans. *Any* person deciding whether to kill a friend faces Arjuna's situation. There is only something special about Arjuna's friends for Arjuna because they are *his* friends. Absent further argument about why this situation is not generalizable, there is no reason to believe that this state component cannot be translated into utilitarian terms. If so much is granted, then (dis)utility can be assigned to any situation in which a parent neglects their child, and the state components Sen discusses can be accounted for by IU.

## **Human Rights**

While the body of philosophical literature on human rights is extensive, there is general consensus on the necessary and sufficient conditions of this kind of rights. These include such attributes as universality and the protection of important human interests, as grounded in the notion of a minimally decent human life, which includes the securing of individual dignity.

I suggest that the way in which IU might contribute to the task of securing human rights is as follows. With general consensus that some conception of a minimally decent human life will be viable, a case can, in principle, be made for the existence of such rights. With appeal to general utility operating solely at the critical level of analysis, the standards for human rights can be general enough to apply universally, but also to allow for cultural variation in their implementation, such that universal assent to their legitimacy might be achieved. If so much is granted, then a case can be made, in principle, for IU-based human rights. I take up this argument in Chapter 4. And if democracy can be shown to be necessary for the protection of important interests, the way is open for a case that supports democracy as a human right that is IU-based. I take up this argument in Chapter 5.

## Notes

<sup>1</sup> Lyons, *Rights, Welfare, and Mill's Moral Theory*, p. 74

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*

<sup>4</sup> *Ibid.*, p. 81

<sup>5</sup> Brandt, *Ethics*, p.353

<sup>6</sup> *Ibid.*

<sup>7</sup> Railton, *Philosophy and Public Affairs* p. 152

<sup>8</sup> *Ibid.*, p. 156

<sup>9</sup> Mill, "On Liberty", Chapter I, 9

<sup>10</sup> Lyons, *Rights, Welfare, and Mill's Moral Theory*, p. 93

<sup>11</sup> Mill, *Utilitarianism*, Chapter V.25

<sup>12</sup> Lyons *Rights, Welfare, and Mill's Moral Theory*, p. 175

<sup>13</sup> While this is a vague term, I read it for the sake of this discussion to mean "unwarranted use of direct application of the principle of utility". One reason I choose this formulation is Lyons' argument that Mill leaves open the possibility that direct application of the principle of utility can be appropriate in adjudication between competing rights claims. Thus direct application of the principle of utility is not a binary matter, rather one that admits of degrees. As in all cases, the principle of liberty is foremost of the principles theorized under IU.

<sup>14</sup> Kymlicka, *Contemporary Political Philosophy: An Introduction*, p. 32

<sup>15</sup> Gibbard, *Social Philosophy and Policy*, p. 100

<sup>16</sup> *Ibid.*

<sup>17</sup> Pettit, Philip, *The Philosophical Quarterly*, p. 54

<sup>18</sup> *Ibid.*, p. 52

<sup>19</sup> Gray, *Social Philosophy and Policy*, p. 83

<sup>20</sup> Nagel, *Concealment and Exposure*, p. 36

<sup>21</sup> Sen, *The Journal of Philosophy*, p. 481

## CHAPTER 4

### HUMAN RIGHTS

In this chapter, I aim to show how indirect utilitarianism supports human rights, first by defining the term ‘human rights’ by reference to the work of James Nickel, then by showing how IU can furnish a justification for human rights that meet Nickel’s criteria. The way in which I use Nickel’s theory in my overall argument is as offering a defensible definition of rights, as well as an account of how we come to that definition – all justificatory work is done by IU. However, there are certain aspects of Nickel’s theory that, I contend, serve as important points of connection with the machinery of IU. I will indicate these places as compatible, commensurate, etc., but these observations about compatibility do not *eo ipso* provide justificatory machinery. I intend to demonstrate how this account improves on Nickel’s theory, by providing it with a more thoroughgoing normative foundation. I then address the main question – whether democracy is a human right – and build upon the arguments from the previous chapters to prepare my case for an IU-based human right to democratic governance, which concludes in Chapter Five. I then present Joshua Cohen’s case for a negative reply to the main question—that making a human right of the right to democratic governance strips the latter of its demanding substance—and respond to Cohen’s argument. Doing so requires

that I address the work of John Rawls, which I do in part by appealing to the work of Akeel Bilgrami. Rawls argues that there is a limit to what degree of agreement we can reasonably expect from global public reasoning, while Bilgrami's appeal to internal reasoning, in my view, blunts the force of the limits Rawls describes.

### **Elements of Human Rights**

In *Making Sense of Human Rights*, James Nickel begins explaining how human rights are a subset of general rights, first by addressing the conceptual issues involved. He begins by enumerating four elements of rights, their fundamental constituents. These are: their conditions of possession; their scope; the addressees of the right; and the weight of the right. The conditions of possession identify the party by whom the right is held. This, Nickel explains, can be as narrow as a single individual (as in the case of a will) or as broad as all humanity. Whether a right is forfeitable or otherwise subject to revocation will be spelled out under that right's conditions of possession.

The scope of a right specifies that to which the right-holder is entitled. For instance, the right to bodily integrity precludes the kind of punishment for crime as the taking of extremities for theft. The scope of a right also includes conditions of operability – that is, specification of when a right comes into play, and what sorts of actions or events evoke the right in question.

The specified addressees of the right are those identified as incurring some obligation correlative to the right in question. Here, Nickel argues, the addressees may either be a particular set of individuals (by which I take him to mean that a perfect duty is incurred) or humanity at large (which I read as meaning that an imperfect duty is



incurred). So, if there is a right to bodily integrity that precludes the kind of punishment for crime as the taking of extremities for theft, then none may mete out such punishment.

The fourth element Nickel enumerates – the weight of a right – specifies whether a right can be overridden, and how. Weight is a measure of ranking among a more general set of norms, and is evoked when norms conflict with one another. To say a right is 'prima facie', Nickel argues, is not to say that it is a right in appearance only, but rather that its weight is unspecified. This will usually mean, he says, that in conflict with other norms, weightier norms can override prima facie rights. Given that rights can vary greatly in their specificity, Nickel argues that the abstractness of rights is not always to be diminished, as this very abstractness can be a feature of a right, rather than a detriment to its significance. For example, “equal protection under the law” is a very abstract right, but one understood to be extremely important.

### **Functions and Types of Human Rights**

After enumerating the elements of rights he supports, Nickel addresses the various functions of rights. He begins this discussion by comparing rights to high-priority goals. Nickel argues that rights are properly distinguished from high-priority goals in virtue of two additional attributes: definiteness and bindingness. That is, in addition to high priority, rights have further, more stringent standards. By ‘definiteness’, Nickel means that rights specify both the right-holder(s) and the addressee(s). That is, particular individuals will be specified as right-holders, while other particular individuals will be specified as addressees (except in the case of an imperfect duty, which may be read as specifying “anyone capable of violation of the right in question” as addressees). By

‘bindingness’, Nickel means that the conferral of a right bestows a mandatory obligation on the addressee(s). This is done to point out that a right is not merely a possession of the right-holder; it also limits the liberty of the addressee(s).

Having identified the elements and functions exhibited by a plausible account of rights, Nickel follows Wesley Hohfeld in categorizing types of rights. Hohfeld classifies rights in four ways: liberty rights involve the obligation not to prevent A from x (e.g. not to prevent one’s freedom of assembly); claim rights involve the obligation to make x available to A (e.g., the mechanics by which one’s vote counts in an election); power rights confer competence on A to x, and involve an obligation to be liable to the particular power x (e.g., the ability to loan my property to others); immunity rights confer immunity from x to A, with a correlative disability by B to x with respect to A (e.g., immunity from any religion’s strictures). His purpose in rehearsing the Hohfeldian schema is to demonstrate the wide variety of normative standings that rights protect and confer, as a matter of their particular functions. Equipped with accounts of the nature and types of rights, Nickel proceeds to the issue of their justification.

### **Justifying Human Rights**

Nickel then addresses the issue of justifying rights. He addresses three positions on justificatory standards for qualifying as a right: entitlement theory; entitlement-plus theory; and legally-implemented entitlement theory. The difference among these three will be in the threshold that must be met in order for a claim to qualify as a right. Under entitlement theory, rights are very strong moral reasons why the holder ought to have certain freedoms, benefits, and so on. According to this theory, which Nickel attributes

to H. J. McCloskey,<sup>1</sup> the right in question is identified as a claim by the right-holder, but these claims are not claims against others, and as such need not specify obligation-holders. Nickel credits this theory with two main advantages. First, this formulation has the advantage of capturing the kind of rights talk people engage in, even when it is not clear who the burden-bearers are. The second advantage Nickel identifies with this theory is that it does not specify particular social milieus, and as such the rights at issue are readily exportable among diverse cultures.

The main disadvantage Nickel identifies with entitlement theory is that under this theory, a moral right will exist whenever there is a particularly desirable good, a result that leads to the possibility that demand outruns supply. That is, given its lack of definiteness, entitlement theory is unable to distinguish between rights and mere high-priority goals. As such, Nickel deems entitlement theory as insufficient to the task of justifying rights.

The second justificatory theory Nickel addresses is entitlement-plus theory, which he attributes to Joel Feinberg.<sup>2</sup> This theory distinguishes between claims to benefits and claims against those who furnish those benefits. Thus, the “plus” of entitlement-plus theory is the very specification of obligation-holders lacking in entitlement theory. However, Nickel notes that Feinberg also allows for “manifesto” rights, thereby leaving room for rights that do not specify obligation-holders in perfect fashion. After analysis of all three justificatory theories of rights, Nickel supports entitlement-plus theory.

The third theory Nickel addresses is legally-implemented entitlement theory, by which rights are established only through codification in law. The argument for this position – which Nickel attributes to Jeremy Bentham – is that entitlement-plus theory

justifies rights that are insufficiently precise to serve as full-fledged rights. To this, Nickel replies by reference to the utility of the term “vehicle,” which – despite its vagueness – does not seem to cause us any trouble, even though the term covers everything from skateboards to space shuttles. Additionally, he reasons, without discussion of moral rights simpliciter, there appears to be no way to evaluate laws, many of which have been revoked due to their inherent injustice. He thus determines legally-implemented entitlement theory to set too high a justificatory standard for rights claims.

### **Making Sense of Human Rights**

In order for human rights to be more than mere wishes or aspirations, Nickel argues, more than a thorough understanding of the general nature of rights is required. Human rights need to be construed within a system of morality. Nickel notes that this must occur only within justified moralities, not all moralities. This, he says, requires some commitment to an objectivity of moral norms – at minimum, it requires that some moral norms are more defensible than others.

Nickel defends the view that full-fledged rights are of the entitlement-plus justificatory model. For a right to count as entitlement-plus, two things must obtain: first, there must be a justifiable entitlement to some freedom or benefit, which involves a strong moral case for making it available to all; and second, the defender of the right in question must be able to justify duties and other burdens. Nickel elaborates on the place of these reasons thusly:

To assert the existence of a justified moral right, in this view, will be to specify an entitlement with holders, scope, weight and addressees and to assert that it is possible to defend this entitlement and its associated burdens with good moral reasons. At the level of moral theory, the identification of these elements may be fairly abstract, with many details

left unspecified. Nonetheless, at least a vague conception of the content of these elements must be present for one to have a full-fledged right.<sup>3</sup>

By “justifiable,” Nickel explains that the case for a justified moral right (such as a human right) must make reference not to accepted or practiced moralities, but rather those that are justifiable, by reference to the theory's preferability in comparison with others. In this chapter I will present indirect utilitarianism as a viable candidate for this role.

### **Starting Points for Justifying Rights**

Nickel observes that justifications of human rights must originate somewhere – that the chain of reasons must bottom out in basic premises. Although Nickel acknowledges a number of starting points for justifying human rights, he argues that basic premises “construe good reasons as those that appeal to the prudence of a rational agent over the long term.”<sup>4</sup> He distinguishes between two basic interests: leading a life, as opposed to having a life. Having a life includes avoiding premature death or incarceration caused by the invasions of others, as well as having access to assistance from others in obtaining necessities. Leading a life means being able to make and carry out key decisions about the kind of life one will live and avoid being treated merely as a resource. While these two basic reasons can be construed as wholly prudential, Nickel argues that they can serve as important interests – as facts about people that can indicate what kinds of protections are required from the right in question, and thereby guide the necessary moral reasoning that leads to the viability of the right.

Nickel argues that any system of morality ought to have the following three features:

- 1 a secure moral claim to life, liberty, and other conditions of a minimally decent

- human life;
- 2 these claims should generate duties to respond, either directly or through institutions;
- 3 in conflicts between claims, inequalities should be minimized.<sup>5</sup>

Nickel notes that although he refers to these features as “claims,” he does not treat them merely as entitlements, without any correlative duties. At a minimum, he says the duties generated will be abstract, in that they generate a general obligation by all relevant agents to organize institutions and social and political arrangements such that they do not undermine fundamental interests. He also notes that they represent minimal standards – he makes no claim that these are the only principles of justice, and explains that, as he conceives theories of human rights, they do not represent complete moral and political theories.

Nickel also explains how rights can be derived from other rights. He demonstrates three ways R2 can follow from R1:

- 1. R1 may be a general or abstract right that implies some more specific right; that is, the scope of R1 includes the scope of R2. For example, the right to freedom of expression entails the right to distribute pamphlets.
- 2. R2 may serve to make violations of R1 less likely, even though the rights operate in different spheres. For example, freedom of the press involves exposing misconduct by officials, which in turn can protect citizens from violations of due process, for instance in criminal trials.
- 3. The effective implementation of R1 may require the implementation of R2, even though R2 is not normally thought to be included in the scope of R1. For example, a woman has a right to unimpeded access to birth control for the prevention of ovarian cysts.

The relationship of implication between R1 and R2 in any of these cases, Nickel argues, can be of varying strengths, along a continuum between essential and merely helpful. He compares this approach with that of Henry Shue, who argues that “security, subsistence, and liberty are basic, so if there are any rights, there will be these three.”<sup>6</sup> Nickel argues

that Shue's sine qua non formulation is too strong, and ought to be replaced by “strongly supportive of,” since examples can be given of the right to, say, asylum without a right to physical security. That is, “supportive of” can function where “necessary for” was meant to, without overstatement.

Again, the account offered here of Nickel’s theory is not used, in my overall argument, as supplying any justificatory machinery – that is supplied by IU. The reason I appeal to Nickel is that his theory presents what I take to be a defensible account of rights, that I contend can serve (and in the overall argument does serve) as an account of how IU can be honed to address the particular question of a human right to democracy. That is, because of the virtues of the entitlement-plus theory of rights Nickel defends against the alternatives, I argue that an Indirect Utilitarian would adopt a set of rules that defines human rights in this way. Adopting a set of rules that defines human rights in either of the alternative ways involves costs that outweigh benefits. Limiting the definition of rights to legally-implemented rights theory seems inadequate, since some wrongs are unaddressed by law, yet seem to involve harm to important human interests. Without recourse to a way to address such harms, we seem to incur costs that outweigh the benefits. On the other hand, defining rights as mere entitlements seems to rob the notion of human rights of their force. If the Indirect Utilitarian reasons that the cost of failing to effectively protect important human interests outweighs the benefits of doing so, then defining rights by entitlement theory is passed over in favor of adopting a set of rules that defines rights according to entitlement-plus theory. Thus does the Indirect Utilitarian reason, in choosing entitlement-plus as a theory of human rights.

## Justifying Specific Goals

Nickel then addresses the question of how one can make the transition from abstract claims pertaining to life, liberty, or fairness to specific rights requiring political implementation. It is possible to do so, he argues, by looking to abstract principles that guide and limit what specific rights permit and require, and by looking also to information regarding contemporary societies that identifies the threats, and the institutions and norms to be used in response to those threats.

Treating the leading of a life as a basic interest, Nickel notes that while the terms “fundamental interest” and “secure claim to life” denote the need for protection of something of great importance, he argues that we must still find a way to make arguments for particular human rights from these abstract concepts. Here he refers to the work of Ronald Dworkin,<sup>7</sup> who argues that the way forward is to elaborate conceptions of the abstract concept in question:

A conception of a concept proposes some general principles that explain why the concept applies in some cases where it clearly does and in those where it clearly does not. To show, for example, that basic freedom is at stake in a particular case considered borderline, elaborate a conception of what is involved in leading a life, or what aspects of human personality are most central. The next step is to use this conception to generate a result for the issue in question.<sup>8</sup>

From among competing conceptions of abstract moral or political principles, Nickel reasons, making a case for a particular one can involve appeal to their congruence with other well-established principles. As an example, he argues that the right against racial discrimination proceeds as follows. The assigning of unequal burdens on the basis of race can have no rational justification. This inability to justify, coupled with the harm caused by discriminatory systems, furnishes the basis for the claim that racial



discrimination violates the principle of fairness. Thus protections against racial discrimination pass the test of importance.

However, Nickel argues, satisfaction of the importance test is insufficient to justify a particular right. It must also be demonstrated that the right in question protects an important interest against some significant, enduring threat. The threat identified as necessitating the right in question must be substantial and recurrent, and must – if it is to justify, in part, the right in question – be demonstrated to be insufficiently addressed by weaker norms. It must also be demonstrated that the right in question is feasible.

In addition to threats to fundamental human interests from individuals or groups (such as discrimination, exploitation, negligence, harm, or murder), threats can also come from government. State-oriented threats can involve the foregoing, Nickel argues, in addition to the following:

- 1 using the criminal law system to suppress opposition and destroy the enemies of those in power;
- 2 victimizing unpopular minorities (or even majorities);
- 3 corruption, favoritism, and ineptitude;
- 4 using imprisonment, torture, and murder to consolidate political power; and
- 5 using political power to extend and entrench the favorable position of a dominant group.<sup>9</sup>

Nickel also argues that omission of protection counts as a threat. He acknowledges that while it can be difficult to determine what counts as an omission, he argues that identification of a duty to act in a particular case is sufficient to demonstrate an omission. So if people have a moral claim to government aid when such aid is required in the protection and provision of fundamental human interests, then the failure to provide aid to, say, victims of natural disasters (for example, residents of New Orleans during and after Hurricane Katrina in 2005) counts as an omission and thus constitutes a state-oriented threat. Nickel explains that the threat requirements are intended to be a low

standard – that the main function of the discussion of threats is to identify those recurrent threats that involve important interests, such that putative rights have a chance at full-fledged justification.

### **Indirect Utilitarianism and Human Rights**

I aim now to demonstrate how IU can furnish human rights that meet Nickel's criteria. Having done so, I intend to then demonstrate how this account improves on Nickel's theory. I do so not merely to show congruity of the theories, but aim moreover to demonstrate how IU, as a viable interpretation of the work of John Stuart Mill executed by David Lyons, might be elaborated further, such that it demonstrates the viability of a human right to democracy. That is, I am to show how it is possible to read the work of Lyons, Nelson, and Nickel (among others) as positions a Millian might take when devoting her efforts to the question of a human right to democracy.

In Chapter 3, I discussed how IU applies direct utilitarian reasoning only at the critical level, and regulates conduct itself only indirectly. Under IU, the question of whether a set of rules ought to be adopted is a matter of weighing costs and benefits. In principle, a right can be established, granted that the absence of a given right is more costly than its general acceptance.

This, in brief, is my IU-based case for a human right to democracy: that in principle, since democracy is the political system that is the most open – in terms of access, publicity, and with legislation subject to reversal – the benefits of maintaining such a system of governance outweigh the costs of doing so. Nelson argues that democracy is justified because it yields the most moral results, in accordance with his

minimal system of morality in Chapter 2. While I believe this is so, the connection between open government and the most moral results in Nelson's argument is altered, when situated in my IU-based argument for democracy as a human right. Recall from Chapter 2 that, by "open," Nelson means that administrators and legislators are forced to defend their actions publicly, and that in meeting this condition, he reasons that administrators and legislators must formulate principles with justifications that are both coherent and likely to be capable of gaining widespread acceptance. The costs of having these features, it seems to me, do not appear exorbitant and outweigh the formulation of principles with justifications that are both incoherent and incapable of gaining widespread acceptance. If so much is true, then an Indirect Utilitarian would adopt the former, rather than the latter, as a set of rules. That is, I treat Nelson's definition of democracy (not his justification) as a set of rules that, because of its demonstrated theoretical superiority over alternate definitions of democracy, would be adopted by an Indirect Utilitarian. It is important to say here that I do not propose IU as a way of accounting for the moral values at stake that is superior to alternate normative theories, but that it can do so, despite common criticism that consequentialist theories cannot furnish substantive rights. Stating the argument purely in terms of the moral values at stake might give some guidance in terms of the relative weight of those values, but with IU these values are represented in such a way that offers a more robust accounting of the values under discussion, such that further refinement and clarification of those values can be undertaken. I turn now to a recapitulation of the arguments made by Nickel, followed at each stage by my grounding of his arguments' claims in IU.

Nickel argues that one starting point for justifying a right is appeal to the basic human interest of leading a life. Since leading a life means being able to make and carry out key decisions about the kind of life one will live and avoid being treated merely as a resource, the fact of the state's coercive power over individuals prompts the correlative question of legitimacy of authority. If democracy is a political system that tends to yield the most moral results, then the government's coercive acts will tend to be more moral. Having access to such a system, it seems to me, would count as necessary for being able to make and carry out key decisions about the kind of life one will live and avoid being treated merely as a resource. So if a case can be made in principle that the benefits of maintaining rights to those liberties necessary for leading a life outweigh the costs, and that democracy is the most effective way to support such rights, then IU furnishes us with the justification for a human right to democracy.

Recall from above that Nickel argues that any system of morality ought to have the following three features: a secure moral claim to life, liberty, and other conditions of a minimally decent human life; these claims should generate duties to respond, either directly or through institutions; and that in conflicts between claims, inequalities should be minimized. I contend that as with the in-principle case for leading a life, IU can furnish Nickel's requirements of a moral system that he uses to justify democracy. Under IU, it can be plausibly argued that the costs of failure to generally maintain conditions of minimally decent human life in a society outweigh the benefits, since social cohesion depends to an extensive degree on individuals generally living a life that meets the standard of minimal decency. This takes us as far as the minimal requirements of Nickel's theory – to show how IU justifies the move from minimal decency to

democracy, further argumentation is required, and I take this up in Chapter 5. Again, I do not argue that Nickel's minimal conditions are met by IU in a way superior to that of rival normative systems; only that it is able to do so, as a component of my more general argument that IU furnishes the machinery by which a consequentialist argument can offer a viable account of rights, more generally, and the human right to democracy, more specifically.

In addition to being compatible with Nickel's minimal requirements, I contend that IU, as a more thoroughgoing normative theory, constitutes an improvement over Nickel's more generic minimal normative system. This is because, in the case of a more thoroughgoing system, chances are greater that more definitive moral guidance will be offered, such that the determination of (morally) right action might more reliably guide behavior. Nickel argues that human rights need to be construed within a system of morality – but only within justified moralities, not all moralities. I contend that IU is a justified morality, and as such can serve as the normative grounding for Nickel's theory of human rights. While Nickel claims that his approach to justifying human rights operates within any justified morality, he does not show this. I present an argument that his approach does operate within one moral theory—IU.

### **Rawls and the Human Right to Democracy**

John Rawls argues<sup>10</sup> that decent hierarchical peoples should be included in the society of peoples, despite their nondemocratic forms of government. Rawls thus implicitly criticizes the position that political rights are human rights as intolerant – thereby setting the terms of the debate, by which human rights are properly considered as

minimal standards that do not accommodate claims to democratic governance. Joshua Cohen appears to accord with Rawls on this point, arguing that although a theocratic society (for instance) may be for that reason unjust, it does not for that reason alone seem to violate human rights.

The reason Rawls gives for the position that decent hierarchical peoples are rightly recognized as well-ordered is that there is, he contends, a limit to what degree of agreement we can reasonably expect from global public reasoning, and agreement upon the universalization of a right to democracy lies beyond these limits.<sup>11</sup> I thus count Rawls as an opponent of my own position. It is on this point about what we can reasonably expect from global public reasoning that I differ with Rawls. In order to make this point, I turn – after a few introductory remarks – to the work of Akeel Bilgrami.

Granted that moral disagreements among cultures are often based upon such apparently unresolvable disputes as which religion is “true,” these disagreements can appear insurmountable. Take as an example the tension between democracy and Islam. Government by the will of the people is anathema to many interpreters of the Qur’an,<sup>12</sup> because for them it is submission to the will of Allah that rightly guides human activity, not people. Liberalism, on the other hand, is centered upon the ideals of individual liberty and equality, and theocratic rule violates the norms that promote these ideals. The source of this dispute thus may seem intractable by appeal to reason. Is it?

As do Amartya Sen<sup>13</sup> and Alistair Macleod<sup>14</sup> (among others), Akeel Bilgrami<sup>15</sup> argues that moral stances are supported by particular reasons, and these are evaluable in relation to the reasons for holding a stance contrary to one’s own. Such evaluation contributes to the process of moral development – altering one’s value system in some

way. Bilgrami reasons that since there is no value-free way to establish the superiority of one system of values over another, the case must be made through fair and open deliberation. The method of persuasion Bilgrami recommends involves rectifying value tensions (most of which, he notes, are more subtle than outright contradictions) arising within an individual's system of moral values, by providing compelling reasons to one's interlocutor in the attempt to sway him to alter his evaluative stance. For instance, Iranians may decide that the way in which Allah guides human activity is via the will of the people, thereby resolving the tension between the Muslim values of submitting to Allah and of resisting oppression by other humans (presuming democracy is a good way to hedge against oppression).

A crucial aspect of Bilgrami's argument is its appeal to historical perspective as a context in which conflicts internal to one's value system can arise, by "introducing tensions and dissonance in the relations between their value commitments."<sup>16</sup> Back to the Iranian example: while street violence there has subsided, the argument between supporters and opponents of the Ayatollah's endorsement of the 2009 Iranian presidential election results continues to rupture the working relationship among top Iranian government officials (who once were closely-allied victorious revolutionaries), and at least part of this argument concerns the tension between theocracy and democracy.<sup>17</sup> I would buttress Bilgrami's point about history by claiming that rights and justice are properly understood as moral responses to wrongs, not as constituents of an ahistorical, abstract social blueprint. The Universal Declaration of Human Rights, for example, was adopted by the United Nations General Assembly as a response to the atrocities of World War II. The reasons supporting particular laws can be illuminated in part by revealing

the historical wrong they are adopted to address. This part played by history, in turn, reinforces the point that, over time, participants in public reasoning are able to learn from the consequences of various points of view, such that the certainty with which convictions are held might be softened, or reimagined, in such a way that the expressions of value take a form that is less likely to result in conflict with other societies. If so much is granted, there is less reason to hew to the narrower expectations about global public reasoning held by liberals such as Rawls and Cohen.

### **Cohen's Democratic Theory**

Joshua Cohen, like Rawls, denies that democracy is a human right. Cohen, like myself, defends a substantive and deliberative account of democracy, but argues that this right is not universal. The main justificatory element of Cohen's deliberative model is a process of public justification guided by an ideal procedure of political deliberation:

The conception of justification that provides the core of the ideal of deliberative democracy can be captured in an ideal procedure of political deliberation. In such a procedure participants regard one another as equals; they aim to defend and criticize institutions and programs in terms of considerations that others have reason to accept, given the fact of reasonable pluralism and the assumption that those others are reasonable; and they are prepared to cooperate in accordance with the results of such discussion, treating those results as authoritative.<sup>18</sup>

Cohen's "fact of reasonable pluralism" is the equivalent of Gutmann and Thompson's "persistence of moral disagreement," and he uses it in the same way, to support his deliberative model. He appeals to Thomas Scanlon's notion<sup>19</sup> of rules "which no one could reasonably reject" to argue that liberty and equality will be substantive elements of a proper democratic theory:

[I]f one accepts the democratic process, agreeing that adults are, more or less without exception, to have access to it, then one cannot accept as a reason within



that process that some are worth less than others or that the interests of one group are to count for less than those of others.<sup>20</sup>

Since Cohen's theory has, as its two main features, a deliberative approach and a substantive element, I will treat his theory as consonant with the one I support. I do this to point out that my disagreement with Cohen over the status of the right to democratic governance as a human right does not result from a difference between his conception of democracy and mine, for there is little substantive difference between us on this point. I will now specify the nature of our disagreement, namely what is reasonable to expect in terms of agreement through public reason.

In "Is There a Human Right to Democracy?" Cohen argues that the reason democracy is not a human right is that making a human right of the right to democratic governance strips the latter of its demanding substance. That is, he argues that human rights have a less demanding content, because they are the result of agreements to which all participants can accede – classifying democracy as a human right, then, dilutes the powerful claims about equality that democracy (but not human rights) demands: "The democracy that justice requires is associated with a demanding conception of equality, more demanding than the idea of membership associated with human rights."<sup>21</sup>

One of Cohen's main premises is that "A conception of human rights is part of an ideal of global public reason: a shared basis for political argument that expresses a common reason that adherents of conflicting religious, philosophical, and ethical traditions can reasonably be expected to share,"<sup>22</sup> and his answer to the main question rests directly upon it. I contend that, like Rawls, Cohen unnecessarily limits the space of reasonably-expected agreement. Through the kind of internal reasoning argued for by Akeel Bilgrami, I hold the view that it can be shown that the limits Cohen believes

restrict reasonably-expected agreement are too narrow. I support a conception of global public reason that is limited in its depth only by the capacities for reason of individuals within the societies involved in the dialogue, and I do not suppose that there are societies in which there are no members with the capability of reasoning equal to that of myself or Joshua Cohen. Since I can understand how the particular values variant across societies are supported by reasons that are available as topics of dialogue between members of different societies, and I presume that members of, say, Afghani society share this ability to understand, and to find ways – to the best of our collaborative ability – to reduce conflict between worldviews. I do not propose internal reasoning-informed deliberation as a panacea for all sources of conflict between societies, nor do I believe that such discussion can be expected to reliably yield regular adoption of compromise or some third position. However, I believe that reducing sources of conflict – however intractable – is possible, and ought for that reason alone to be pursued. The time-frame of such discussion can be decades and generations long, but with participants deliberating in order to reduce conflict, the expression of incommensurable conceptions of the good by those societies, and the conflict those expressions give rise to, can, over time, be modified so as to reduce conflict between societies.

### **Democracy and Indirect Utilitarianism**

I will now attempt to demonstrate IU's suitability as a ground for the claim that democracy as deliberation-based open government is the superior definition of democracy. Having done this, I will argue that Nelson's outcome-based justification benefits from the more robust moral framework provided by IU.

The positive account Nelson defends appears well-suited for augmentation by an indirect utilitarian foundation. According to Nelson, democracy is justified in virtue of the tendency of open government to produce legislation that is just, according to his conception of an adequate morality, which is characterized by the three principles listed above. As such, it seems that augmentation of the minimalist account of morality offered by Nelson – along with his outcome-based justification of democracy – by IU, favors a more robust consequentialist account of the justification of democracy. Unlike Nelson's minimalist account, IU centers on a particular conception of the good, namely human well-being. Aside from the fact that conceptions of the good vary, it is the level of analysis I wish to specify as the added value, here. I contend that IU is sufficient to this task. I will attempt to demonstrate as much now.

As regards Nelson's account of morality, IU can provide a more robust justification for each of the provisions. For the requirement that “the principles must represent a system of rules proscribing harmful conduct and ensuring beneficial conduct,” IU can account for this provision by appealing in principle to an ideal social rule in order to supply the principle that failing to provide a system of rules proscribing harmful conduct and ensuring beneficial conduct runs counter to an important interest all citizens share. Likewise with the requirement that “the principles must be able to serve as the public, shared set of principles constituting a stable, fundamental charter of a well-ordered human association”: without such arrangements, individuals are deprived of the kind of social stability important to their interests. For the requirement that “the principles must be able to perform the function articulated in (the previous requirement) in a society of free and independent persons,” liberty is the interest protected, and serves

as the object of the ideal social rule (that is, the point at which the principle involved directly references general utility) in question.

IU can also justify the claims made by Gutmann and Thompson in their theory of deliberative democracy. Their six principles – reciprocity, publicity, accountability, basic liberty, basic opportunity, and fair opportunity – can each be evaluated by IU's cost/benefit test, in order to determine whether or not IU can affirm these same principles. Take, as an example, reciprocity. The acceptance utility of affirming a system by which benefits of discursive exchange, as well as respect for the points of view of others, is mutual, is reasonably projected to be quite high, particularly in relation to the acceptance utility of a system that neglects reciprocity, since people are more likely to feel secure in their pursuit of good (or least bad) results when their points of view are respected. Gutmann and Thompson's characterization of democracy as a conception of government that accords equal respect to the moral claims of each citizen, and is thus morally justifiable from the perspective of each citizen, increases the likelihood that the most moral outcomes will result from legislation that is justifiable to the greatest number of participants.

Here, then, is how I view IU as furthering the argument for a human right to democracy. On Mill's account, rights involve interests, and the interests served by the principle of justice that could be defended on utilitarian grounds are the most important. Rights to security and freedom of action are seen by Mill as most vital, and as such they correspond with the primary obligations of justice and thus take precedence over all other obligations. While Mill and William Nelson agree that representative government is best, Nelson elaborates on Mill's notion of the development of citizens' moral character under

democratic government, and specifies openness (in his particular sense<sup>23</sup>) as the feature of democracy that, through its practice, leads to the most moral results. These results appear both in legislation and in the character of democratic citizens, and will have to do with limiting the kinds of harm and encroachment on liberty that tend to result to a greater degree under other forms of government. Thus far we have, under IU, a way of accounting for democracy's being right, but do not yet have an account of democracy being a right. Since, as Nickel argues, leading a life is the proper standard for defining the minimally decent human life, those interests necessary for leading a life will merit the protection furnished by human rights. If democracy characterized by Nelson's sense of openness is the one an Indirect Utilitarian would elect as the set of rules with the highest acceptance utility, then the government's policy and legislation will tend to be more moral, and the institutions of that government will better protect the relevant basic human interests. Having access to a democratic system would thus count as necessary for being able to make and carry out key decisions about the kind of life one will live and avoid being treated merely as a resource. So if a case can be made in principle that the benefits of maintaining rights to those liberties necessary for leading a life outweigh the costs, and that democracy is the most effective way to support such rights, then IU furnishes us with the justification for a human right to democracy.

## **Conclusion**

In this chapter, my aim has been to ground my analyses of the concepts of democracy and human rights in IU, in order to argue that democracy is a human right. Having made my case, I have defended my main claim against the majority position that

democracy is not a human right, as represented by John Rawls and Joshua Cohen. Provided that my defense of the minority position on the question of whether democracy is a human right overcomes the objections raised by these two authors, I conclude that I have presented a viable account of a positive answer to the question of whether democracy is a human right.

## Notes

<sup>1</sup> McCloskey, *Philosophical Quarterly*, p. 119

<sup>2</sup> Feinberg, *The Journal of Value Inquiry*, p. 186

<sup>3</sup> Nickel, *Making Sense of Human Rights*, p. 40

<sup>4</sup> *Ibid.*, p. 87

<sup>5</sup> *Ibid.*, p. 91

<sup>6</sup> *Ibid.*, p. 101

<sup>7</sup> Nickel, p. 121

<sup>8</sup> *Ibid.*, p. 104

<sup>9</sup> *Ibid.*, p. 107

<sup>10</sup> Rawls, *The Law of Peoples*, p. 216

<sup>11</sup> *Ibid.*, p. 219

<sup>12</sup> Farooq, in *Message International* accounts for the antagonism in some quarters between democracy and Islam in this way:

The Muslims who agree ... that Islam and democracy are incompatible ... basically find any idea or institution of western origin to be unpalatable. But going one step further, they argue that democracy and Islam are fundamentally incompatible because of the difference in the concept of sovereignty. According to them, in Islam sovereignty belongs to God alone. Human beings are mere executors of His Will. On the other hand, in democracy (or, to be precise, secular, western democracy), sovereignty belongs to people, which in the view of these Muslims constitutes *shirk* or polytheism. Many notable Muslim personalities, including Sayyid Abul A'la Maududi (in his earlier writings), have rejected the secular western democracy, at least at the philosophical level. According to such perspective, "Islam, speaking from the view-point of political philosophy, is the very antithesis of secular Western democracy . . . [Islam] altogether repudiates the philosophy of popular sovereignty and rears its polity on the foundations of the sovereignty of God and the vicegerency (*Khilafah*) of man." [*Political Theory of Islam*, in Khurshid Ahmad, ed. *Islam: Its Meaning and Message* (London: Islamic Council of Europe, 1976), pp. 159-161.]

Unfortunately, even though in his later life his view about the compatibility between Islamic political system and democracy was much more favorable and positive, what Maududi articulated earlier as a philosophical rejection of "secular western" democracy has been perceived or upheld by many Muslims and non-Muslims as rejection of democracy *per se*. It is not all too uncommon among Muslims, especially among revivalist Muslims, that Khilafat is what defines the Islamic political system, and they are not willing to trade or adjust Khilafat with democracy in any way.

<sup>13</sup> Sen, *The Journal of Philosophy*, p. 483

<sup>14</sup> MacLeod, *Universal Human Rights: Moral Order in a Divided World*, p. 14

<sup>15</sup> Bilgrami, *Social Science Research Council*

<sup>16</sup> *Ibid.*

<sup>17</sup> Fathi, Nazila, and Slackman, Michael, "Options Shrink for Opposition as Iran Tightens Grip", *New York Times*, June 25, 2009, retrieved June 25, 2009.  
<<http://www.nytimes.com/2009/06/26/world/middleeast/26iran.html>>

<sup>18</sup> Cohen, *The Egalitarian Conscience: Essays in Honour of G. A. Cohen*, p. 21

<sup>19</sup> Scanlon, *What We Owe to Each Other*, p. 176 – 177

<sup>20</sup> *Ibid.*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid.*

<sup>23</sup> See Chapter 2 of this volume.



## CHAPTER 5

### IRAQI WOMEN AND THE HUMAN RIGHT TO DEMOCRACY

In this chapter, I analyze a theory of democracy as a human right, and offer some amendments to it. I take as a starting point for this discussion the work of Allen Buchanan, and offer some (friendly) amendments to his approach to the main question of democracy as a human right. Buchanan's endeavor to establish a normative grounding for international law posits democracy as a human right, though one contingent upon its enabling the protection of more fundamental security rights. Such contingency is potentially problematic for the attempt to establish political equality, since there is insufficient argumentation in a defense of security rights to support political rights, as I attempt to demonstrate in part by appeal to the political situation currently faced by women in Iraq. Political rights such as those Buchanan defends are more securely grounded, I contend, in accounts of an egalitarian ideal, such as those defended by Elizabeth Anderson and Samuel Scheffler. I argue that understanding the way in which Buchanan justifies equal security rights in Anderson's and Scheffler's way—as augmented by the work of Carol Gould—can also provide a justification for the political (human) right to democracy. I present a reformulation of one component of Buchanan's

approach based on Anderson's work, with the aim of reinforcing Buchanan's wider effort to provide an interests-based account of international justice that includes democracy as a human right.

Allen Buchanan's approach is novel in that it critiques the orthodox foundation of international law, which posits—in a variety of theories—either peace or national interest as its aim. He forcefully argues that these goals are inferior to international law's proper aim, which he contends is justice. Since providing justification is in part a normative project, and the fulfillment of either peace or national interest is compatible with massive injustice—while the fulfillment of justice in turn entails a justifiable fulfillment of the other two—justice, Buchanan argues, is the superior normative principle and thus the proper justificatory foundation. Buchanan's project is thus a theoretical effort to provide a moral foundation for international law, but one that is attuned to difference and injustice.

Buchanan's general approach articulates an international framework of justice within which nations can permissibly differ culturally, institutionally, and in myriad other ways. One condition he places on permissibility of difference in the character of the institutional frameworks that constitute national governments is political participation, in the form of democratic governance. His effort to formulate democracy as a requisite of justice employs a particular conception of human rights, which I detail below. I turn first to a general discussion of such theories before presenting Buchanan's.

## **Instrumentalism**

There are two senses of instrumentalism that come into play in the current discussion: one refers to the relation among values, for instance arguments that democracy is important only because it safeguards physical security; the other is normative-theoretical, and is used to distinguish consequentialist theories from, say, deontological ones. In this chapter, I critique alternatives to Buchanan's as being instrumental in the first sense – namely, that they pose the importance of democracy as predicated solely on what it can do to get us other things (security, etc.). This criticism does not extend to the second sense, that consequentialist theories such as IU are instrumental, in the way that all values can, in some way or other (c.f. the variety of forms of utilitarianism) be seen as instrumental to utilities that measure a conception of the good, in this case (my use of IU) human well-being.

A deeper question about my use of IU in the argument for the human right to democracy is how it fits together with my arguments in support of Buchanan. As with the other authors referenced in this volume, the aim of my use of IU is to provide a more robust normative-theoretical foundation for the human right to democracy than is to be found in any of the particular arguments (for rights, for democracy), and in turn present these arguments as defensible applications of IU to the question of democracy as a human right. That is, in trying to show how IU can furnish a human right to democracy, I refer to auxiliary arguments I then spell out in IU terms, in order to cohere the various arguments and IU into a single argument with a comprehensive conception of the good tied to the human right to democracy.

## **Foundational Issues for Human Rights Theories**

One problem faced by human rights theorists is choosing the foundation to which they appeal in defending human rights. This problem arises due to the fact that a theory's beginning determines, in part, its end. This, as Alistair Macleod notes,<sup>1</sup> is because the particular justification given for a right is so intimately tied with its content and scope that the foundation provided determines to a significant degree the nature of the rights yielded by the particular theory. Working as one must with an elaborate array of social and political considerations from conception to implementation of such rights, a human rights theorist runs the risk of choosing a foundation well-suited for some tasks, yet unsuited for others.

The human rights literature contains a variety of arguments for democracy as a human right. However since most are instrumental, they are vulnerable to the criticism that nondemocratic alternatives—which may secure the same end(s) to which democracy is instrumental—must be for that reason equally acceptable to proponents of these instrumental arguments. Due in part to this vulnerability that is characteristic of the alternatives, I turn here to the argument advanced by Allen Buchanan.<sup>2</sup>

### **Buchanan's Project**

In his insightful and compelling *Justice, Legitimacy, and Self-Determination*, Buchanan argues that international law should be based on justice, rather than peace or national interest. His particular conception of justice requires access by all persons to institutions that protect human rights. On Buchanan's account, principles of justice ascribe basic and uncontroversial rights to all humans just because they are humans.

Human rights, according to Buchanan, are the most general moral rights we can ascribe to individuals, and their correlative obligations are the most general obligations we can incur. As a result, he argues, human rights cannot be overridden by direct utility maximization, or other such considerations.<sup>3</sup>

Among the various human rights, Buchanan specifies those which protect the interests most crucial to a decent human life, and designates these “basic human rights.”<sup>4</sup> Since the particular rights Buchanan specifies are generally aimed at the protection of the body of the individual, they can be broadly classified as basic security rights. Even those rights that do not appear to proscribe basic security violations are consequences of those that do. For example, the rights to due process and equality before the law relate directly to the right not to be subject to arbitrary arrest, detention, or imprisonment—all three of which count as basic security rights. Given this, it can be said that Buchanan’s theory of justice is directed initially at the establishment of basic security rights, rather than, for example, economic or political rights.

### **Democracy as a Human Right**

In addition to the basic security rights listed above, Buchanan attempts to establish democracy as a human right. He acknowledges that this position places him in the minority among international legal scholars.<sup>5</sup> Buchanan presents three separate but convergent arguments to establish democracy as a human right.

The first of Buchanan’s three arguments is the argument from equal moral consideration, the main premise of which is the moral equality principle. The argument for this principle is that equal consideration requires that all persons have the same

fundamental status, as equal participants, in important political decisions.<sup>6</sup> Such status, the argument concludes, is optimally conveyed to individuals under democratic institutions.

Buchanan's second argument is the instrumental argument. This states that even if democracy is not a basic human right, it is of such high instrumental value to the protection of basic human rights as to justify a right to it.<sup>7</sup> This argument, among the three, is the one most obviously contingent upon the validity of the set of basic human rights.

Buchanan's third argument for democracy as a human right is what he calls the agency argument. This argument states that in order to carry much moral weight (as, he argues, states must), states must serve as agents of their citizens.<sup>8</sup> The optimal system by which this is accomplished, the argument claims, is democracy, since presumably those occupying the roles, designated by the political institutions of the state in question as having the highest decisional power, are unable to accurately reflect the will of that state's citizens without some apparatus by which their preferences can be measured.

Buchanan states that all three arguments are compatible with one another, and that their convergence provides strong support for democracy as a human right.<sup>9</sup> The relationship they share can be characterized as a cluster argument, since they do not all point to a single conclusion directly (as with the relation between sub-conclusions and their main conclusion) but rather cohere such that they reinforce one another's conclusions. In Buchanan's schema, the moral equality principle seems intended to be the most basic of the three arguments, and the other two appear intended to situate the moral equality principle empirically. That is to say, the strength of the agency and instrumental

arguments are dependent upon empirical claims in a way the moral equality principle is not – however, they are meant to add content to the cluster argument in such a way that democracy is secured as a human right.

However, the issue of the arguments' compatibility is separate from that of their sufficiency to perform the work Buchanan intends. It is evident from his work that he views democracy as a human right as requiring argumentation in addition to that provided for the list of basic human rights cited earlier. So the argumentation that supports democracy as a human right is distinct from that which supports security rights. This is due in part to the fact that Buchanan's list of more fundamental, less controversial (in that they are already recognized by the international legal system) human rights depends directly upon the argument from a minimally decent human life, whereas the argument for democracy as a human right rests upon the protection of the more basic human rights. In the following section I will assess Buchanan's argument for democracy as a human right in terms of its sufficiency, with an eye toward offering what support seems required.

### **Problems for Buchanan's Approach**

While I strongly support not only Buchanan's project to establish norms for the international legal system that center on human rights, but also his narrower project of establishing democracy as a human right, I believe I can identify a component of Buchanan's theory, which—if clarified—can contribute a more compelling argument for democracy as a human right. I will first identify what I take to be the needed clarification, and then propose that a conception of human rights based not on individuals' physical

security alone, but also on their political status, better serves as the foundation upon which Buchanan's argument for democracy as a human right can rest.

Buchanan contends that together, the three arguments for democracy as a human right provide strong support for recognizing such a right under international law. Their compatibility is apparent. However, in regard to the strength of their support for a human right to democracy, their sufficiency is also at issue. With cluster arguments, the support for the conclusion is to be found either in a particular argument (which is unlikely, since there is thereby no reason to employ this form of argument), or from the relation among the clustered arguments, in "whole greater than sum" fashion. Among the three arguments or their interrelation, we ought to discern the requisite machinery by which Buchanan justifies democracy as a human right.

If we look to the instrumental argument to justify a human right to democracy, we seem to find no machinery for the establishment of democracy as a human right, since the content of this justification is simply that democracy appears to be useful in the securing of basic human rights. Such content is too vague to provide support specific to democracy, since alternate institutions seem able to protect basic human rights without fulfilling the democratic minimum. In any event, the issue here is empirical.

If we look to the agency argument, we also appear to lack the necessary machinery for establishing democracy as a human right, since it is conceivable that a benevolent despot might reliably reflect the preferences and interests of a nation's citizens without satisfying the conditions of the democratic minimum, yet this same despot would satisfy the requirements of the agency argument.

Although it can be argued that the only sense in which agency is represented even



in democracy is indirect, a distinction can be drawn between a representation of agency as reliable reflection, on the one hand, and actual political participation, on the other. Under despotism, it is at most the first of these senses of agency which can occur, however since this is so also for most (if not all) democracies, this distinction appears not to diminish the implication that the agency argument is unable to perform the work Buchanan intends of it. Except in fully participatory institutions, the agency involved is indirect, and a benevolent despot can fulfill the criteria for indirect agency at least as well as democratic institutional agencies.

If we look to the moral equality principle, this justification is not contingent upon which type of institution protects basic human rights, but we must analyze the content of the moral equality principle in order to determine whether it requires democracy. The moral equality principle appears to require only that all individuals count as equals in moral consideration. Without further specification, there is nothing in this formulation that requires democracy, so we appear to have exhausted the three principles, taken on their own, without identifying the requisite machinery to justify a human right to democracy.

The final place to seek sufficient argumentation is in the relation between the three arguments. Buchanan argues elsewhere<sup>10</sup> that multiple partial arguments suffice as whole arguments, that in effect three half-loaves make (at least) a whole loaf, and thus seems to carry this idea over to the present discussion. The problem with such reasoning is, at the very least, in the case of a partial argument, determining just how much of an entire argument it makes: half? one-fifth? If such argumentation does not reduce to absurdity, at minimum it seems unworkable.

Buchanan states that “[the three arguments] are compatible; we need not choose between them. Together they provide strong support for recognizing the right to democratic governance as a basic human right under international law.”<sup>11</sup> Since this statement yields no account of how the cluster of arguments supports the claim that there is a human right to democratic governance, I conclude that Buchanan’s argument for a human right to democratic governance stands to benefit from clarification.

Buchanan begins his justification by taking the Kantian moral equality principle for granted. It thus appears that the moral equality principle is the fundamental premise, and the agency and instrumental arguments situate the moral equality principle in the political milieu, with its standard empirical assumptions. The problem I see is not necessarily that Buchanan lacks the argument for a human right to democratic governance – rather that the elements of his argument stand to benefit from clarification. I thus hope to offer here a more detailed account of just how the considerations to which Buchanan appeals support a human right to democratic governance.

It seems that two separate problems arise for Buchanan in this discussion. The first is that his case for security rights by itself does not provide clear enough argument for a right to democracy, as I have argued above. The second problem is that Buchanan seems not to provide any argument for equal security rights. That is, a claim to any right is not always a claim to an equal right, and thus an argument that establishes a right for all humans does not necessarily thereby establish equal human rights. The provision of equality here must itself be substantiated by argument.

As an example of a theory in which rights are universally held yet not equally so, one might as part of one’s theory lexically order creatures according to their complexity,

in which case the rights of human beings will not be equal to the rights of, e.g., dolphins (provided the latter are indeed less complex). Another kind of inequality of rights can appear in the priority with which they are protected. For example, the basic security rights of the elderly, while they are indeed basic security rights, might appear later in line for protection than those of younger people (not merely as a matter of implementation, but also of principle). The equality of rights depends in part on the structure of the argument provided for them. If the argument is based on a single characteristic all individuals possess to whatever minimal degree matters, then it turns out that all have equal rights. If the argument isn't so based, inequality of universal rights is possible.

Nonetheless, this exploration of security rights suggests a more fruitful strategy. If the structure of one's argument is such that equality of rights is provided, it could also be that the same structure might provide the right to democracy in virtue of the same feature that provides equality. My strategy here is to point out that by investigating the arguments Buchanan gives for equal security rights, it is possible to make an argument that Buchanan is committed to equality of the kind defended by Elizabeth Anderson,<sup>12</sup> Samuel Scheffler,<sup>13</sup> and Carol Gould.<sup>14</sup> I will present an account of equality that draws on strengths from all three authors' accounts.

It is possible that Buchanan misconstrues the point of equality. Perhaps the point of equality is not guaranteeing protection of individuals' basic security rights alone, but also guaranteeing access to political equality. Since Buchanan's approach appears not to furnish a sufficiently rich engine to secure political rights, I will examine alternate approaches to equality.

## **A Viable Egalitarianism<sup>15</sup>**

In “What Is the Point of Equality?” Elizabeth Anderson undertakes a thorough and thought-provoking analysis of a number of attempts to formulate the proper aim of social and political equality. Her positive case begins with a valuable inquiry into the nature of the systems of inequality to which egalitarian systems historically have responded. The problem, she argues, is the idea of justified social hierarchy, specifically the relationship between humans deemed inferior and those deemed superior. The variety of injustices which constitute oppression all share the common root of this social inequality. Thus, as Anderson remarks, “the proper negative aim of egalitarian justice is...to end oppression, which by definition is socially imposed. Its proper positive aim is...to create a community in which people stand in relations of equality to others.”<sup>16</sup> Since the basic security violations that rightly concern Buchanan are rooted in unequal interpersonal relations, it might be said that Buchanan’s approach focuses on symptoms of the problem and not the problem itself. Oppression is the general problem, and Buchanan’s basic security violations are but one category of this problem.

It is clear that both Buchanan and Anderson are opposed to hierarchical societies, and endorse egalitarianism as part of the liberal framework with which both begin. They are thus both committed to equality from the outset. If, however, we then ask what is meant by ‘equality’ (or ‘in virtue of what is attribution of security rights equal?’), we get Anderson’s reply: that it’s about respect (as contrasted with oppression), and that part of what it is to respect people is to include them in participation, while another part of what it is to respect people is to not violate their basic security rights. Anderson argues that such a formulation of the idea of equality supports the right to democracy in the

following way:

[Egalitarian political movements] assert the equal moral worth of persons. ...Negatively, the claim repudiates distinctions of moral worth based on birth or social identity—on family membership, inherited social status, race, ethnicity, gender, or genes. ...Positively, the claim asserts that all competent adults are equally moral agents: everyone equally has the power to develop and exercise moral responsibility, to cooperate with others according to principles of justice, to shape and fulfill a conception of their good.<sup>17</sup>

When equality is understood as equal respect for moral agents, this particular kind of respect for agency not only prohibits terrorizing agents, which provides an argument for security rights (as in the first paragraph quoted above), but also encourages allowing agency to participate, which provides an argument for democracy. Equality formulated as equal respect for moral agents is the concept that constitutes the deep structure of Anderson's approach. So if we think of an Andersonian argument as an argument for security rights, then it's also an argument for democracy.

Thus the kind of egalitarianism advanced by Anderson is properly called democratic; its focus is equality of political rights. However, she does not limit her standard of equality to those kinds of human functioning that are specifically political (e.g., voting, running for office, and the like), but extends it to all kinds of functioning necessary for standing as an equal citizen.<sup>18</sup>

Anderson lists three structural points of democratic egalitarianism, which outline guarantees that she argues are necessary to functioning as a free and equal citizen, and to avoiding oppression. First, "Democratic equality guarantees effective access to the various human capabilities necessary for functioning as an equal citizen and avoiding oppression."<sup>19</sup> This provision specifies that, among the various human capabilities, the effective access guaranteed by democratic equality is limited to those capabilities

necessary for functioning as an equal citizen (the positive provision) and avoiding oppression (the negative provision). So a provision of Anderson's approach is access to a limited range of capabilities, one which excludes frivolous considerations, but which also includes the possibility of individual human flourishing.

The second provision specifies that "[d]emocratic equality guarantees not access to equal levels of functioning, but effective access to levels of functioning sufficient to stand as an equal in society."<sup>20</sup> This provision establishes that political institutions are not obliged to provide a uniform level of functioning for all individuals, but limits institutional obligations to the guarantee of access to levels of functioning sufficient to stand as an equal in society. So I needn't be provided access to a level of functioning which makes it possible for me to do everything the mayor does, but rather that I be provided access to a level of functioning which prevents me from occupying a position of citizenship inferior to that of the mayor. The point Anderson makes here appears limited to political equality, as it is explicit only about obligations of political institutions. Economic inequalities are problematic to the extent that they undermine equal social standing, however I leave the point here as limited to the obligations of political institutions, and remain silent on the issue of economic inequality here.

The third provision is that "Democratic equality guarantees access to a package of capabilities sufficient for standing as an equal over the course of an entire life; i.e., it is not a 'starting-gate' theory."<sup>21</sup> Individuals are not simply to be provided access to capabilities during a specific time, after which the relevant political institutions are exonerated from further obligations of justice. Rather the level must be maintained over the course of an individual life.

Concurring with and elaborating on Anderson's thesis in his "What Is Egalitarianism?," Samuel Scheffler argues that distributive-egalitarian arguments cannot stand alone, but must rather be grounded in a more general conception of equality, one which establishes it as a normative ideal:

[E]quality is most compelling when it is understood as a social and political ideal that includes but goes beyond the proposition that all people have equal moral worth. It is this ideal that we invoke when we say that our society should be organized as a society of equals. The case is analogous to other human relationships that we take to be governed by an ideal of equality. When we say, for example, that a friendship or a marriage should be a relationship of equals, we do not mean merely that the participants are of equal moral worth but also that their relationship should have a certain structure and character. Similarly, I believe, our notion of a society of equals expresses a normative ideal of human relations.<sup>22</sup>

Scheffler treats this argument as consonant with Anderson's conception of democratic equality, as do I and – by my reading – as would Anderson.

However, since it is a capabilities approach, Anderson's formulation of equality might instead weaken Buchanan's approach if, as with standard formulations of capabilities approaches, it is committed to a purely abstract universalism with respect to human rights. In *Globalizing Democracy and Human Rights*, Carol Gould argues that abstract universality involves a problematic essentialism that exposes it to criticisms similar to those advanced by Marxists and feminists – that conceptions of human essence employ standards that tend to exclude individuals we normally consider to be uncontroversially human. Gould supports capabilities approaches, with important qualifications. One qualification is that the concept of universality inherent in human rights be also concrete rather than purely abstract. What is concrete about the universality Gould suggests is that it is constituted by intersociative norms – those constructed through the networked interactions among particular caring and choosing individuals.

Intersociative norms provide a way of accounting for universal norms through contextualization in what Gould calls “‘individuals-in-relations’ ontology,” which characterizes the human not only as a discrete individual but also as a social being. Establishing universal claims in this way, Gould argues, avoids both cultural relativism and cultural imperialism, because it neither affirms the lack of any universal moral standards, nor does it impose a putative universal standard that is alien to whichever society is under discussion. Since it is built not from abstraction but from concrete interactions among individuals, it is nonessentialist.

In order to establish this concrete notion of universality, Gould identifies care as one of three sources of intersociative norms. It is this particular aspect of her project that I contend can furnish Anderson’s approach with the account of how humans acquire capabilities essential to individual liberty. Regarding liberty, Anderson makes the point that “Libertarians tend to identify freedom with formal, negative freedom: enjoying the legal right to do what one wants without having to ask anyone else’s permission and without interference from others. This definition of freedom neglects the importance of having the means to do what one wants.”<sup>23</sup> Gould argues that having the means to do what one wants involves certain developmental requirements, and that among these is care. Anderson’s articulation of freedom’s positive aspect is compelling, but incomplete. I contend that the account of how one comes to have the means to do what one wants, which Anderson argues is essential to the concept of freedom, can be filled in by Gould. In addition, a Gouldian amendment to Anderson’s approach renders democratic egalitarianism immune to criticisms about essentialism that have been aimed at abstract universalism.



### **Clarification of Buchanan Through the Proposed Egalitarian Approach**

In Buchanan's argument, security rights are justified to the degree to which they protect basic interests. However, in Buchanan we find no account that interests should be protected equally – he appears to take equal protection of interests for granted. Buchanan thus presumes a kind of equality about basic security rights. There are two different claims Buchanan makes – one explicit, one implicit. The first is that we each have basic security rights, the other is that those rights are equal. That is, it is possible to say that everyone has security rights, without saying that everyone's rights are equal; one individual's security rights could be stronger than another's. Although Buchanan appears to presume such equality of rights, upon analysis he provides no argument for it.

The egalitarian approach I've presented above is able to furnish Buchanan with the argument that everyone's rights are equal. The way in which security rights become equal security rights is via Anderson's deep back structure, in her argument for equality as equal respect for moral agents. In addition, if we take the egalitarians to be providing Buchanan an argument for equal security rights, I suggest it is profitable to then look at whether that argument gives a right also to democracy. Looking to Anderson's deep back structure of equality as equal respect for moral agents, I contend that the argument supplied Buchanan for equal security rights also provides the right to democratic governance. Since Anderson's kind of egalitarianism requires equal standing in society, and this involves not only a prohibition against taking advantage of inferior social standing but allowing agency to participate, democracy is strongly recommended as the political system that meets democratic egalitarianism's requirements.

Comparing the two formulations of justice, Anderson's account of equality aims

directly at political rights, while Buchanan's account aims at basic security rights, which are significantly more robust than his political rights. Thus the conception of equality employed (but not argued for) by Buchanan is equality of basic security rights, which I've argued is insufficient to the task to which Buchanan's theoretical structure is set, which is the establishment of a system of justice in which democracy is a human right.

If Buchanan defines human rights not simply as a list of rights that protect the interests most crucial to human flourishing, but as protecting interests necessary for functioning as an equal citizen and in freedom from oppression, he can incorporate democratic egalitarianism as part of the machinery of his system of justice and thereby furnish the clarification that benefits his argument for a human right to democratic governance. Rather than merely providing for a minimally decent life, justice ought to be defined as providing for a minimally decent, unoppressed life. The capabilities of functioning as an equal in society and in freedom from oppression plausibly qualify as interests crucial to human well-being, and thus ought to correlate to human rights in Buchanan's theory. This alone does not get us as far as democracy, until we tie functioning as an equal in society and in freedom from oppression to the second-order selection of democracy as a set of rules with a high acceptance utility. I return to this below.

In the following section I present a problematic political case with which I intend to demonstrate the differences I have argued are present in the comparison between Buchanan approach and the amended version I propose. The point of the example will be to demonstrate that founding one's theory of human rights on the protection of security rights is insufficient to justify a human right to democracy.

## **Iraq, Shari'a, and Equal Political Rights for Women**

The example case concerns the current political situation in Iraq. I intend to show that while Islamic law (Shari'a) provides equal security rights for women, it does not provide equal political rights. As a result, Buchanan's security-based rights can benefit from clarification. In this section I will first substantiate the claim that Shari'a involves a tendency to define gender roles that assign unequal political rights to women, and then attempt to demonstrate how the case of Iraq is problematic for Buchanan, but not Anderson.

According to a study by the United States Institute of Peace, "Islamism...is destined to play a major role in the future of Iraqi politics."<sup>24</sup> Many Islamist regimes are characterized by denial of women's social and political rights. This issue thus arises with each new possibility of a regime that is subject to the influence of Islamic law. A development in January 2009 – in which guarantees that at least 25 percent of Parliamentary seats would be set aside for women that were included in earlier versions of Iraqi election law were excluded from the law's published version – demonstrates the frailty of the constitutional safeguards placed against such exclusion.<sup>25</sup>

Security rights for women in Islamic societies, however, appear roughly equal to those of men.<sup>26</sup> Thus under Shari'a Iraqi women have equal security rights, but they are likely to have unequal political rights.<sup>27</sup> Article 2 of the Iraqi constitution reads

First: Islam is the official religion of the State and it is a fundamental source of legislation:

- A. No law that contradicts the established provisions of Islam may be established.
- B. No law that contradicts the principles of democracy may be established.
- C. No law that contradicts the rights and basic freedoms stipulated in this constitution may be established.

It is possible that the patriarchal tendency of Islam will deny women political rights. A

sufficient number of the citizens of Iraq may be willing to accept this, as a result of their placing greater value on religious interests. In addition, the proscription of such a development by Iraqi political institutions can count as religious persecution, since it denies Iraqi citizens the freedom to live in accordance with their religious beliefs. While the perils to women's political rights represented in article 2A are provided for in article 2C,<sup>28</sup> the "established provisions of Islam" are likely to reflect that culture's curtailment of the political rights of women, which means that these two articles are likely to come into conflict with one another at some point. What will result from this conflict is anyone's guess, but the prospects are dim for women's rights, given that the allegiance of most Iraqi citizens to their religious leaders seems to be stronger than that to the current government, in light of how that government's legitimacy is questioned by many, given that it was formed in collaboration with the United States.

Because Shari'a, like benevolent despotism, can conceivably guarantee protection of basic human rights without guaranteeing political rights, Buchanan's approach does not appear to provide his desired answer to the question of the social justice of women's curtailed political rights under Shari'a. Since Anderson's approach aims directly at political equality, we can reasonably expect better results from her approach in this case. First, because democratic egalitarianism guarantees effective access to the various human capabilities necessary for standing as an equal in society and maintaining freedom from oppression, and Shari'a denies some of these, democratic egalitarianism will preclude incorporation of Shari'a into statute. Certainly rights specific to political capabilities are among these, but so also are a number of capabilities necessary for equal citizenship, such as education, freedom of movement, engagement in public discourse, to name but a

few. Each of these examples represents capabilities denied women in a number of Islamist societies. By securing access to the spectrum of capabilities necessary for standing as an equal citizen, democratic egalitarianism precludes such oppression.

Second, because democratic egalitarianism guarantees not access to equal levels of functioning, but effective access to levels of functioning sufficient to stand as an equal in society, and Shari'a denies such access, democratic egalitarianism will preclude incorporation of Shari'a into statute. The second provision of democratic egalitarianism ensures not that all function at the same level, but access to a level of functioning is guaranteed such that every individual is free from a social position substantially inferior to that of any other.

Third, because democratic egalitarianism guarantees access to a package of capabilities sufficient for standing as an equal over the course of an entire life, it would not only have precluded incorporation of Shari'a into statute in the formation of the Iraqi Constitution, but would also preclude incorporation into statute of Shari'a as a future political contingency.

It might be argued that Shari'a is a problem also for Anderson's view, in the following way. Since it can be argued that women and men are treated as equals, but have different roles to play in Islamic society, and one difference in these roles is that women do not have the political rights men have, under Shari'a men and women are in fact treated as equals, even though they do not have the same political rights.<sup>29</sup> However, if we recall Anderson's deep back structure of respect for moral agents, there are two parts to her kind of respect for agency, such that – negatively speaking – we ought not to impede human agency from expressing itself and – positively speaking – we ought to

allow it to participate. Given this distinction and Anderson's requirement that both obligations be met, the situation does not meet Anderson's standard of equality, so poses no problem for her.

In summary, I contend that Buchanan's, Anderson's, Scheffler's and Gould's cosmopolitan arguments are mutually reinforcing. Buchanan makes a strong case for cosmopolitanism by offering a substantial positive theory of international justice based on protection of universal human interests, and Anderson, Scheffler, and Gould strengthen his argument by making what's implicit in Buchanan explicit, in part by shifting Buchanan's foundational focus from security rights to political rights.

For sufficient motivation for such a change in his definition of human rights, we need look no further than Buchanan's moral equality principle. Recall that the moral equality principle is Buchanan's strongest case for democracy as a human right, but is itself insufficient as justification for democracy as a basic human right. Limiting the concept of equality to that of inviolability of basic security rights ignores the social dimension of human existence, and thus the idea that oppression is an entailment of social inequality. This is what I mean by saying that Buchanan misconstrues the point of equality. However, his approach appears able to accommodate a change in its concept of equality. Acknowledging the social nature of human existence thus motivates the enhancement of the concept of equality in the moral equality principle, such that it incorporates guarantees of effective access to the various human capabilities necessary for functioning as an equal citizen and avoiding oppression, which is democratic egalitarianism.

With the proposed change to Buchanan's concept of equality, institutions will,

under a democratic-egalitarian conception of human rights, thus be legitimate only if they protect the right to equal citizenship and freedom from oppression. This approach will secure the protection of the entire list of basic security rights that motivates Buchanan's approach. So it appears as though by undertaking this redefinition, Buchanan sacrifices nothing that is important to his approach, and gains the machinery required for the task of justifying democracy as a human right. By proposing this friendly amendment to Buchanan's approach, my aim has been to offer a more robust justification for democracy as a human right, which I hope might promote discussion toward a more promising discussion of political rights as human rights.

### **Indirect Utilitarianism and the Human Right to Democracy**

I turn now to a demonstration of how IU supports the central claims of my "Andersonized Buchanan" account. One element of Elizabeth Anderson's argument is that egalitarianism is a response to systems of inequality – that the problem egalitarianism addresses is the idea of justified social hierarchy, specifically the relationship between citizens deemed inferior and those deemed superior. Under IU, the minimization of oppression passes the "in principle" utility test by benefitting the many, rather than the few: since the most severe kinds of oppression are in most instances constituted by the rule of a minority over a majority, the costs – in utilitarian terms – of maintaining oppression outweighs the benefits of such a system, thereby failing the "in principle" utility test and thus (rightly) lacking justification under IU.

From there, I contend, Anderson's argument spells out, with specificity lacking in the general account of IU, what a set of first-order rules indicated by the second-order

standards of IU looks like. That is, if we take the Andersonized Buchanan argument as the foreground discussion of democracy as a human right, IU supplies a way to reason about the background structure of the argument, including how we arrive at the assumptions Buchanan and Anderson make, and how to reason about the relative value of the concepts endorsed in the other accounts involved in the discussion of democracy as a human right. The benefit of couching the foreground discussion (Buchanan, Anderson, et al.) in IU is that IU gains in specificity from the foreground argument, while the foreground gains orientation within a more thoroughgoing normative framework. A direct argument from IU to a human right to democracy would lack this dynamic structure, and offer less by way of guidance through the argument – hence the strategy taken here.

The grounding of my claims about clarifying Allen Buchanan's case for democracy as a human right in IU, I contend, strengthens my general argument. In this chapter, I argue that since the basic security violations that rightly concern Buchanan are rooted in unequal interpersonal relations, Buchanan's approach focuses too much on symptoms of the problem, and not enough on the problem itself. Oppression is the general problem, and the basic security violations that concern Buchanan are but one category of this problem. By grounding this argument in IU, I am able to buttress this argument with the claim that, if a persistent wrong is identified as a symptom of a deeper wrong (as with the relationship between basic security violations and oppression, more generally), then a case can be made in principle for addressing the deeper wrong directly, as with my Andersonized Buchanan argument.

In this case, the deeper wrong is the maintenance of political inequality. This is



because the likelihood that the general welfare is greater under systems of maintained social inequality is virtually nonexistent. As such, the cost-benefit test, as articulated under IU, reliably recommends against the maintenance of social inequality. In this way, IU justifies the deeper background of Anderson's conception of equality.

According to IU, democracy has a high acceptance value, since it is the form of government that involves the greatest advantage (least disadvantage) for human well-being. This is due to the way democracy tends to support mutual respect and minimizes political inequality, encourages deliberation, requires openness, and so on. IU advises that we choose the set of rules that maximizes well-being, and the auxiliary arguments throughout the present dissertation, concern the best formulations of the relevant concepts, which in turn indicate particular sets of rules (regarding democracy, rights, and so on). So IU is a second-order aiming at human well-being, with the auxiliary arguments operating as first-order sets of rules. From these – if my arguments (and those of the philosophers I reference) are persuasive – I derive an argument for the human right to democracy.

## **Conclusion**

In this dissertation, I have argued that democracy is a human right. In order to support this claim, my argument proceeded from a foundational moral grounding (Indirect Utilitarianism), through analyses of the concepts involved (human rights and democracy), to my conclusion. I began by specifying the definition of democracy I find superior; proceeded to an explication of the normative theory to which I appeal for my claims; then to a discussion of the justification of rights in general; followed by a

discussion of human rights, and finally to my case for the human right to democracy. This I followed with a survey of the literature representing the opposing position, in order to catalogue the concerns my positive account needed to address. I then proceeded to my own justificatory account. Having presented my positive account, I addressed the various criticisms of the minority position, using arguments that either blunt such criticism or demonstrate how the criticisms do not address my own position.

## Notes

1 Macleod, *Universal Human Rights: Moral Order in a Divided World*, p. 14

2 In so doing, I will not myself formulate an entirely unique account of how to establish the right to democracy, rather I will point out how one of the most interesting and prominent attempts to do so fails, and then suggest what more can help it. This paper thus begins with Buchanan as its subject and a viable account of democracy as a human right as its aim, and therefore does not represent a free-standing defense of human rights in general, nor of other fundamental concepts, such as equality.

3 Buchanan, *Justice, Legitimacy, and Self-Determination: Moral Foundations for International Law*, 122 – 3 [I offer an account of Millian rights that do not run afoul of this stricture.]

4 *Ibid.*, p. 129

5 *Ibid.*, p. 142

6 *Ibid.*, p. 143

7 *Ibid.*

8 *Ibid.*, 2004, p. 144

9 *Ibid.*, 2004, p. 145

10 *Ibid.*, 1983

11 *Ibid.*, 2004, p. 145

12 Anderson, 1999

13 Scheffler, 2003

14 Gould, 2004

15 Anderson's and Scheffler's arguments occur within the discussion of the merits of luck egalitarianism. For this article, I will remain silent with respect to the merits of the arguments for and against luck egalitarianism, and will make use only of these authors' positive accounts of the proper understanding of egalitarianism.

16 Anderson, *Ethics*, p. 318

17 *Ibid.*

18 *Ibid.*

19 *Ibid.*

20 *Ibid.*

21 *Ibid.*

22 *Ibid.*

23 Anderson, *Ethics*, p. 315 [emphasis added]

24 Fuller, *The New Turkish Republic: Turkey as a Pivotal State in the Muslim World*

25 'Changes in Iraq Election Law Weaken Quota for Women', New York Times, January 13, 2009, accessed via <<http://www.nytimes.com/2009/01/14/world/middleeast/14iraq.html>> on 1/14/2009.

26 Here I refer to security rights per se. That other impositions on the interests of women – for instance, the denial of education – worsen the overall situation of women in Islamic societies is a claim I do not dispute.

27 The Qur'an is in fact silent on the issue of women's political rights, thus the source of gender-based repression is not doctrinal. Feisal Abdul Rauf offers an account of the systematic apparatus that permits such patriarchal insinuation into the ideology of Shari'a:

The problem lies in confusing cultural norms with religious belief or law. Unless we separate the theological from the sociocultural dimensions of the issue, we are likely to misread the situation. What complicates the understanding of the gender issue, even by Muslims, is that Muslim jurists regarded the custom (*adah*, '*urf*'), or common law of a society, as a source of law when the Qur'an or sunnah was silent on an issue. Thus, what was custom in a particular time or place found its way into Islamic law. [Rauf, 2004]

This appears to account (in at least broad terms) for how patriarchal cultural norms have become associated with Islamic law.

28 Article 14 of the Iraqi Constitution reads "Iraqis are equal before the law without discrimination based on gender, race, ethnicity, origin, color, religion, creed, belief or opinion, or economic and social status."

29 One example might be a gender-based variety of the Rawlsian consultation hierarchy.

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